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No. 04-___

IN THE

Supreme Court of United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC, AND IRVING AZOFF,
Petitioners,

v.

DON FELDER,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is the question whether a party waived its right to compel arbitration through litigation conduct presumptively decided by the arbitrator, as held by the Eighth Circuit and the highest courts of two states, or by the court, as the court below and the First and Fifth Circuits have concluded?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the Superior Court of California and real parties in interest in the California Court of Appeal, are Eagles, Ltd., Don Henley, Glenn Frey, Eagles Touring Co., Eagles Merchandising Co., Eagles Recording Co., N.E.A., LLC, and Irving Azoff. Respondent is Don Felder, who was the plaintiff in the Superior Court and petitioner in the California Court of Appeal.

CORPORATE DISCLOSURE STATEMENT

Eagles, Ltd., Eagles Touring Co., Eagles Merchandising Co., and Eagles Recording Co. are closely held corporations. N.E.A., LLC is a California limited liability corporation. No publicly held company holds more than 10% of the stock in any of these entities. No publicly held corporation or publicly held entity has any interest in the outcome of this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the California Court of Appeal in this case.

OPINIONS AND JUDGMENTS BELOW

The order of the Supreme Court of California denying review is reported at 2005 Cal. LEXIS 3169 (Cal. 2005) and reprinted in the Appendix ("App.") at 14a. The opinion of the Court of Appeal (App. 1a) and the judgment of the Superior Court (App. 12a) are unreported.

JURISDICTION

The opinion of the California Court of Appeal was issued on December 9, 2004. The Supreme Court of California denied the petitioners' timely petition for certiorari on March 23, 2005. This Court has jurisdiction to review the judgment of the California Court of Appeal pursuant to 28 U.S.C. § 1257. *See Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984) (state-court decision denying motion to compel arbitration is "final" for purposes of Supreme Court review under 28 U.S.C. § 1257).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

At issue in this case is the scope of an arbitrator's authority to decide procedural questions of arbitrability. The court below ruled that petitioners are not entitled to compel arbitration under an agreement governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), because they waived their right to arbitrate through inconsistent litigation conduct. In holding that it is for the court and not the arbitrator to decide that waiver issue, the decision below adds to a significant conflict among the federal courts of appeals and state supreme courts – a conflict recently acknowledged by the First Circuit. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 10 (2005). It also runs contrary to a trio of recent decisions in which this Court, consistent with the strong pro-arbitration policy of the FAA, has held that arbitrators, and not courts, should decide "procedural" questions of arbitrability, including "allegations of waiver, delay, or a like defense to arbitrability." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (internal quotation omitted); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *PacificCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). This Court should grant review to resolve the conflict of authority and vindicate the FAA's strong policy in favor of arbitration.

1. Petitioners Don Henley and Glenn Frey are the founding members of the Eagles, the well-known rock band; petitioner Irving Azoff is the band's long-time manager. Respondent Don Felder was not an original member of the Eagles, but played with the band as a guitarist in the 1970s and again when the band reunited in the 1990s for its successful *Hell Freezes Over* album and tour. On August 31, 2000, the band members, including Felder, entered into an agreement setting forth their respective rights and obligations with regard to each other and with regard to the national and inter-

national sale of a four-CD "box set" collection of songs from throughout the band's history (the "2000 Agreement"). Paragraph 6 of the 2000 Agreement provides that "any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration." App. 26a.

2. In early 2001, the Eagles decided to reunite again, this time without Felder. Felder responded to the unanimous decision of his former band-mates by filing a complaint in California state court against petitioners Henley, Frey and Eagles, Ltd. in February 2001, seeking involuntary dissolution of Eagles, Ltd. and an accounting. App. 3a. Felder filed a second complaint in May 2001 against the same defendants and related Eagles entities (the "Eagles Defendants") alleging, *inter alia*, wrongful termination and breach of contract. The two actions against the Eagles Defendants were consolidated and petitioners answered the consolidated complaint, raised affirmative defenses, and participated in discovery. *Id.* The parties stayed all litigation activity for eight months in 2003 to pursue settlement. In November 2003, Felder abandoned the settlement negotiations and hired new counsel.

In January 2004, Felder filed a new $40 million complaint against Azoff, the band's manager, who was not a party to Felder's original lawsuits. Felder obtained consolidation of his new complaint with his old suits against the Eagles Defendants, and then dismissed what had been the primary and unifying claim of his old suits – dissolution of Eagles, Ltd. Felder's new complaint significantly changed his theory of the case, asserting new allegations of conspiracy and other wrongful conduct against Azoff and the Eagles Defendants in connection with the negotiation and performance of the 2000 Agreement.

As a new defendant, Azoff obtained a continuance to allow himself adequate time to evaluate and prepare a defense. App. 3a-4a. In June 2004, he answered Felder's latest complaint and raised affirmative defenses. Azoff responded to

discovery requests by Felder, but did not conduct any affirmative discovery of his own. App. 12a.

In August 2004, Azoff moved the state trial court, under the FAA, to compel arbitration of the consolidated actions. App. 4a; *see Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984) (FAA governs in state as well as federal court). Felder's new claims against all of the defendants, Azoff argued, revolved around negotiation and purported breach of the 2000 Agreement. Accordingly, they "ar[ose] out of or [were] in connection with" the 2000 Agreement under the terms of section 6. App. 4a. The Eagles Defendants joined in Azoff's motion, arguing that Felder's case, as "newly configured," now fell within the terms of the 2000 Agreement's arbitration clause. *Id.*; *see Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (arbitration may be allowed even after active litigation where plaintiff changes "scope or theory" of original claims); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509-10 (7th Cir. 1999) (same). Felder opposed the motion on the ground that petitioners had waived the right to arbitrate by initially defending against his claims in litigation. App. 5a.

3. On September 20, 2004, the California trial court granted petitioners' motion to compel arbitration, thus holding that Felder's claims against Azoff and the Eagles Defendants were subject to arbitration under the 2000 Agreement. The court rejected Felder's waiver defense, finding that Azoff had timely filed his motion to arbitrate "as soon as his counsel were up to speed in the case," and that Felder had not been prejudiced by the initial litigation because Azoff had taken "no action to undermine or impair [Felder's] ability to take advantage of the benefits and efficiencies of arbitration." App. 5a. That result, the court concluded, was consistent with the "strong public policy in favor of arbitration." *Id.*

4. On writ of mandate, the California Court of Appeal

reversed. The Court of Appeal did not dispute the trial court's holding that all of Felder's claims were subject to arbitration under the 2000 Agreement. Instead, it ruled that petitioners had waived their right to compel arbitration by participating in the litigation initiated against them by Felder.

Before the Court of Appeal – as before the trial court – petitioners argued that any question of waiver was for the arbitrator to decide, pursuant to this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). The Court of Appeal rejected that position, holding that "[i]t is the court, not the arbitrators, that determines the issue of waiver of arbitration by litigation conduct." App. 6a. The court acknowledged *Howsam*'s statement to the contrary, providing that "the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Id.* (quoting *Howsam*, 537 U.S. at 84) (internal quotation omitted). The court went on to find, however, that the *Howsam* rule does not apply to the issue of waiver by litigation conduct, which is "more properly addressed by the court." App. 7a. That carve-out from *Howsam*, the court reasoned, was compelled by its own prior case law distinguishing between litigation-related and non-litigation-related waiver claims. App. 6a (relying on *Omar v. Ralphs Grocery Co.*, 118 Cal. App. 4th 955 (2004)).

As to the waiver issue itself, the court held that the trial court erred in its assessment of the litigation conducted below and the impact of that litigation on Felder's rights. Unlike the trial court, the appellate court found that the litigation conduct of both Azoff and the Eagles Defendants had been "inconsistent with the right to arbitrate," App. 9a, and that Felder was "affected, misled or prejudiced" by that conduct. *Id.* (citation & quotation omitted).

5. The Supreme Court of California denied petitioners' petition for discretionary review on March 23, 2005.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE COURTS OVER WHETHER WAIVER BY LITIGATION CONDUCT IS PROPERLY DECIDED BY THE ARBITRATOR OR BY THE COURT.

The decision below adds to a substantial and growing conflict among the federal circuit and high state courts regarding an arbitrator's presumptive authority under the FAA to determine issues of waiver by litigation conduct. This Court has addressed the issue of arbitration waiver once already, directing that absent a contrary specification in the arbitration agreement, "allegations of *waiver*, delay, or a like defense of arbitrability" are matters for the arbitrator, and not the court, to decide. *Howsam*, 537 U.S. at 84 (emphasis added). But despite that guidance, the issue remains a source of widespread confusion in the lower courts. The Court should take this opportunity to clarify that *Howsam* means what it says, and that *all* waiver issues are presumptively for the arbitrator to decide.

1. The issue in *Howsam* was whether a court or an arbitrator should decide a claim that arbitration was barred by an alleged failure to comply with an arbitral limitations period. 537 U.S. at 81. The Court explained that in light of the strong federal policy favoring arbitration, "procedural questions" of arbitrability "are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (emphasis in original). The time-limit rule at issue in *Howsam*, the Court concluded, fell within the "procedural" category of issues reserved to the arbitrator – primarily because it so "closely resemble[d]" the "waiver" and "delay" issues already deemed to fall within the arbitrator's purview. *Id.* at 85 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

2. In the wake of *Howsam*, three federal circuit or high state courts have concluded that the issue of waiver by litiga-

tion conduct is to be decided by the arbitrator and not by the court. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Woodland Limited P'ship v. Wulff*, 868 A.2d 860, 865 (D.C. 2005); *Guam Housing & Urban Renewal Auth. v. Pac. Superior Enter. Corp.*, 2004 Guam 22, ¶ 40;[1] *see also Int'l River Ctr. v. Johns-Manville Sales Corp.*, 861 So.2d 139, 144 (La. 2003) (applying *Howsam* to conclude that for arbitration agreements governed by state statute similar to the FAA, "waiver is reserved for the arbitrator to decide").

The reasoning of those courts is straightforward. A plain reading of *Howsam*, they conclude, resolves the issue and dictates that a defense of waiver by litigation conduct proceed to arbitration. *See* 328 F.3d at 466; 868 A.2d at 865; 2004 Guam at ¶ 40. Moreover, the mere fact that "the question of waiver . . . will turn on the degree and nature of [the claimant's] participation in the court proceeding" does not trump the rule announced in *Howsam*. 868 A.2d at 865. At least where the parties have entered into a broad arbitration agreement, binding themselves to arbitrate "any dispute arising under or related to" that agreement, the presumption remains that the arbitrator will decide the procedural question of waiver by litigation conduct. *Id.*[2]

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[1] Congress' 2004 amendments to the Organic Act of Guam, 48 U.S.C. § 1424, which governs Guam's judicial system, eliminated language that had provided for Ninth Circuit review of the decisions of Guam's Supreme Court and instead made the Supreme Court of Guam the equivalent of any other state supreme court for purposes of certiorari review. *See* Act of Oct. 30, 2004, Pub. L. No. 108-378, 118 Stat. 2206.

[2] In a similar context, the Second Circuit has held that the arbitrator, rather than the court, should decide whether a party has waived the right to arbitrate through pre-arbitration conduct purportedly repudiating the arbitration agreement. Like the courts discussed above, the Second Circuit – considering the issue after this Court remanded the case for further consideration in light of *Howsam* – concluded that *Howsam* is properly read to require that *all* procedural defenses to arbitrability, including waiver, estoppel, and delay, be decided by the arbitrator. *See Mulvaney*

3. Those holdings – which reflect a proper and straightforward reading of *Howsam* and the FAA – stand in sharp contrast to the decision below and to recent decisions by the First and Fifth Circuits holding that allegations of waiver by litigation conduct are to be decided by the court, not the arbitrator. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (specifically acknowledging conflict); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004) (unpublished); *see also Republic Ins. Co. v. PAICO Receivables LLC*, 383 F.3d 341 (5th Cir. 2004) (deciding merits of waiver-by-litigation defense). Like the California Court of Appeal, the First and Fifth Circuits have concluded that allegations of waiver by litigation conduct should be treated as an exception to the rule established by *Howsam*, and presumptively decided by courts rather than arbitrators.[3]

None of those decisions is anchored in a reading of *Howsam*, the FAA, or any general principle of arbitration law. Instead, they turn primarily on what the First and Fifth Circuits deem an "important policy" justification: that courts are better positioned than arbitrators to assess the litigation conduct put at issue by claims of litigation waiver. *See* 402 F.3d at 13 (relying on "comparative expertise" of courts in identifying "abusive forum shopping"); 97 Fed. Appx. at 464 (because waiver "depends on the conduct of the parties before the district court," court is in "best position to decide"

Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 351 F.3d 43, 46 (2d Cir. 2003).

[3] Several other courts have come to the same conclusion implicitly, by deciding the litigation waiver issue on the merits without expressly considering whether the issue should instead be arbitrated. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004); *Highlands Wellmont Health Network v. John Deere Health Plan*, 350 F.3d 568, 574 (6th Cir. 2003); *Carbajal v. H&R Block Tax Servs.*, 372 F.3d 903 (7th Cir. 2004) (affirming district court decision reaching merits of litigation-waiver issue); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 586 S.E.2d 581, 585-86 (S.C. 2003).

the issue).

4. Not surprisingly, the clear conflict among the federal courts of appeals and high state courts is mirrored by substantial confusion in the lower courts, where there is also no consensus on the role of the arbitrator in deciding issues of waiver by litigation conduct. *Compare Bellevue Drug Co. v. Advance PCS*, 333 F. Supp. 2d 318, 324 (E.D. Pa. 2004) ("Since *Howsam*, the majority of the Courts of Appeal to have considered the issue in precedential opinions have concluded that waiver is an issue that presumptively should be presented to the arbitrator in the first instance.") (citing cases) and *Housh v. Dinovo Invs., Inc.*, No 02-2562, 2003 U.S. Dist. LEXIS 3707, at *32-33 (D. Kan. 2003) (under *Howsam*, "the Court must apply the presumption that the waiver issue should be decided by an arbitrator") *with Carbajal v. Household Bank, FSB*, No. 00-C-0626, 2003 WL 22159473, at *9 (N.D. Ill. Sept. 18, 2003), *aff'd* 372 F.3d 903 (7th Cir. 2004) (issue of waiver by litigation conduct should be submitted to the court).

In short, the conflict identified by the First Circuit in *Marie* persists and has only grown deeper as courts continue to adopt sharply conflicting interpretations of governing federal law and this Court's decision in *Howsam*. The Court should grant a writ of certiorari to resolve this clear conflict.

II. THE DECISION BELOW CONFLICTS WITH THE STRONG PRO-ARBITRATION POLICY EMBODIED IN THE FEDERAL ARBITRATION ACT AND RECOGNIZED BY THIS COURT.

1. As this Court has recognized repeatedly, the Federal Arbitration Act evinces Congress' clear intent to pursue a liberal public policy favoring arbitration and to "reverse the longstanding judicial hostility to arbitration agreements." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *see also Keating*, 465 U.S. at 10 ("In enacting [the FAA], Congress declared a national policy favoring arbitration.").

Under the FAA, agreements to arbitrate are to be enforced as written, and courts must refrain from resolving any question that the parties have agreed to arbitrate. *See* 9 U.S.C. § 2; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mastrobuono*, 514 U.S. at 62.

Consistent with that pro-arbitration policy, this Court has held repeatedly that where the parties have entered into a written agreement to arbitrate, all disputes and issues relating to that agreement must be decided by the arbitrator, not the court. A court's role in arbitration disputes is limited to deciding two threshold "questions of arbitrability": whether there is a valid and enforceable arbitration agreement and whether the arbitration agreement covers the dispute at issue. *See Howsam*, 537 U.S. at 84; *Green Tree*, 539 U.S. at 445. Once it is resolved that the parties have indeed agreed to arbitrate, then any "procedural" questions – even if they are "potentially dispositive gateway question[s]," the resolution of which "will determine whether the underlying controversy will proceed to arbitration on the merits" – are for the arbitrator and not the court to decide. *Howsam*, 537 U.S. at 83-84. And that category, as the Court explained in *Howsam*, includes "allegation[s] of waiver, delay, or a like defense to arbitrability." *Id.* at 84 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

The Court applied this principle in a trio of cases decided in the October 2002 Term, unequivocally affirming the broad scope of authority given to arbitrators and rigorously policing the concomitant limits on court authority. In *Howsam*, as noted earlier, the Court considered a claim that arbitration was barred by failure to comply with a limitations period and held that, like an allegation of waiver, such claim was for an arbitrator to decide. 537 U.S. at 85. In *Green Tree*, the issue

was whether classwide relief was available in arbitration. Again, the Court held that the question did not "fall into the limited circumstances" over which courts have authority, because it involved "neither the arbitration clause's validity nor its applicability to the underlying dispute." 539 U.S. at 445. Accordingly, the availability of classwide relief is to be decided by the arbitrator and not the court. *Id.* Finally, in *PacificCare*, the Court applied the *Moses H. Cone* presumption in favor of arbitration to hold that the availability of treble damages under an arbitration agreement – even where it is the key to the agreement's enforceability – is for the arbitrator to decide. 538 U.S. at 407 n.2.

2. The decision below is contrary both to the broad pro-arbitration policy of the FAA and to the precedents of this Court applying that policy. The California trial court recognized that the "strong public policy in favor of arbitration" militates in favor of sending *all* waiver issues to arbitration. App. 13a. The California Court of Appeal, on the other hand, failed to apply or even to address the *Moses H. Cone* rule that all doubts are to be resolved in favor of arbitration. *Cf. PacificCare*, 538 U.S. at 407 n.2 (applying *Moses H. Cone* presumption in favor of arbitration). And the decision below cannot be reconciled with the *Howsam/Green Tree/PacificCare* line of cases, which collectively establish a firm rule that *all* issues related to arbitration, excepting only those going to the validity of an arbitration agreement or its application to a particular dispute, are to be decided by the arbitrator and not the court. Nothing in any of those decisions even suggests a special exception for the issue of litigation waiver – a remarkable oversight if the Court actually had intended such a radical and important departure from its otherwise applicable law.

Nor is there any legitimate policy reason for departing here from the general rule that "procedural" arbitrability, including waiver, is for the arbitrator to decide. As *Howsam*

explains, the "narrow exception" to federal arbitration policy that allows courts to decide threshold questions relating to the validity and scope of arbitration agreements is intended only to safeguard the intent of the contracting parties. 537 U.S. at 83 (court decides narrow questions of validity and applicability so that parties are not forced to arbitrate matters that they have not agreed to arbitrate). Where, as here, the scope of the arbitration clause agreed to by the parties is intentionally expansive, applying to "any and all disputes arising out of or in connection with [the] agreement," App. 26a, there can be no question but that the parties intended to submit *all* disputes, including disputes over litigation waiver, to the arbitrator for resolution. *See Woodland*, 868 A.2d at 865 (where parties agree to broad arbitration clause, no reason to make exception to *Howsam* for issue of waiver by litigation); *cf. Green Tree*, 539 U.S. at 451-52 (broad arbitration clause encompasses and requires arbitration of any dispute over what kind of arbitration proceeding the parties agreed to).

Finally, the "comparative expertise" rationale offered by the First Circuit in *Marie*, 402 F.3d at 11, and echoed by the Fifth Circuit in *Tristar Financial*, 97 Fed. Appx. at 464, cannot justify an exception to *Howsam* for litigation-related claims of waiver. As a general matter, this Court has rejected the position that arbitrators are less able than judges to decide complex legal and factual questions, deeming any such suggestion "far out of step" with the pro-arbitration policy of the FAA and its endorsement by the Court. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (statutory civil rights claims may be subjected to mandatory arbitration). The same presumption of arbitrator expertise extends to factual questions about the conduct of parties to an arbitration agreement. That much is clear from this Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967), holding that arbitrators are not only permitted but also required to make certain factual findings in assessing claims of fraud in the

inducement in connection with an arbitration agreement.

Moreover, as a purely practical matter, there is no reason to think that deciding claims of waiver by litigation would somehow push arbitrators beyond their capabilities, or even prove especially difficult for arbitrators. Whether a party has taken discovery not available in arbitration, for instance, or filed a counterclaim without asking for a stay of litigation, or requested arbitration close to a trial date, *see* App. 7a (listing factors relevant to waiver inquiry) – all are facts that an arbitrator can readily ascertain from the record, to the extent that they are even disputed by the parties. If anything, arbitrators may be *better* situated than courts to decide whether a party has obtained through litigation information it could not through arbitration – a key factor in assessing prejudice. *See St. Agnes Med. Ctr. v. PacifiCare*, 82 P.3d 727, 738 (Cal. 2003). Arbitrators are as capable as judges of determining what evidence was in fact obtained through the litigation process but, unlike judges, also have expertise as to what information could be obtained through arbitral discovery and claim-specification processes. In any event, arbitrators routinely assess prejudice when allegations of non-litigation waiver, laches, and similar equitable defenses are brought before them, and can do the same in this context, too. *See, e.g., Ill. Dep't of Human Servs. v. United States Dep't of Educ.*, 263 F. Supp. 2d 1119, 1122 (N.D. Ill. 2003) (affirming arbitrator's resolution of laches claim, including arbitral determination of prejudice); *Alexander Julian, Inc. v. Mimco, Inc.*, No. 00 Civ. 4131, 2001 U.S. Dist. LEXIS 5744, at *8 (S.D.N.Y. 2001) (affirming arbitrator's determination regarding prejudice resulting from delay).

Indeed, this case itself illustrates the ease with which a decision-maker other than the original trial court can resolve a claim of waiver by litigation conduct. The trial court in this case ruled *against* Felder on the question of waiver by litigation conduct, finding that Azoff had not unduly delayed

his request for arbitration nor availed himself of discovery opportunities available only in litigation, and had not prejudiced Felder's ability to take advantage of the "benefits and efficiencies of arbitration." App. 12a. But the appellate court – relying purely on the cold record and the parties' briefs – believed itself fully capable of reaching the opposite conclusion, finding instead that Azoff had indeed impermissibly delayed his request for arbitration and taken "steps not available in arbitration," with the result that Felder was "'affected, misled or prejudiced.'" App. 9a (citation omitted). There is no reason why an arbitrator could not undertake precisely the same analysis as the court below – an outcome that would have the decided advantage of being consistent with, rather than contrary to, the presumption of arbitrability codified by the FAA and reflected in this Court's case law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 20, 2005

APPENDIX

APPENDIX A

Filed 12/9/04 Felder v. Sup. Ct. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DON FELDER, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. EAGLES, LTD., et al., Real Parties in Interest.	B178402 (Super. Ct. No. BC244814, Cons. w/BC249741 and BC309927) (Mel Red Recana, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate granted.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP, Louis R. Miller and Joel N. Klevens for Petitioner.

No appearance for Respondent.

Kaye Scholer LLP, Larry R. Feldman and Julian Brew for Real Party in Interest Irving Azoff.

O'Melveny & Myers LLP, Daniel M. Petrocelli, Carla J. Christofferson and Thomas P. Jirgal for Real Parties in Interest Don Henley, et al.

Petitioner, Don Felder challenges an order of respondent court granting the motion of defendant Irving Azoff, in which other defendants joined, to compel arbitration of Felder's consolidated lawsuits against them. We hold respondent court erred in granting the motion because the defendants waived their right to do so. Accordingly, we grant the petition.

FACTS AND PROCEDURAL HISTORY

From 1974 to 1980, Felder was a guitarist for the renowned rock band the Eagles. Real party Irving Azoff is the band's long-time manager. The band reunited in 1996 for its "Hell Freezes Over" tour and again in 1999 to perform a series of three concerts leading up to the millennium.

The band also anticipated releasing a four-CD "Box Set" that included three compact discs of previously recorded material and one compact disc of the Millenium Concerts. On August 31, 2000, the band members (Glen Frey, Don Henley, Timothy Schmit, Joe Walsh and Felder) executed a "Preliminary 2000 Deal Memorandum" ("the Memorandum") setting forth the members' rights and obligations concerning the Millenium Album and the Box

Set. Paragraph 6 of the Memorandum provides that "any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum."

In February 2001, after Henley and Frey decided to "regroup" without Felder, Felder filed an action in Los Angeles Superior Court against Henley, Frey and Eagles, Ltd. (of which Felder was a one-third owner) (Eagles defendants) for involuntary dissolution of Eagles Ltd. and an accounting. Several months later, in May 2001, Felder filed a second action against the same defendants and several related Eagles entities for breach of an implied-in-fact contract, wrongful termination, breach of fiduciary duty, breach of written contract, an accounting, and declaratory relief. These actions ("the Eagles actions") were consolidated. Felder and the Eagles defendants vigorously litigated the Eagles actions (including a cross-complaint against Felder) for over three years.

In January 2004, Felder filed a complaint against Azoff (Azoff action) for breach of fiduciary duty and fraud. alleging that Azoff conspired with Frey and Henley to exclude Felder from the Eagles' business and ultimately oust Felder from the band. In February 2004, Azoff, represented by the same law firm representing the Eagles defendants, appeared in the action and in April 2004, demurred to Felder's First Amended Complaint on the merits. Azoff did not raise any contention regarding arbitration. Azoff answered the First Amended Complaint. He raised 15 affirmative defenses, but never raised any right to arbitration. As early as February 2004, counsel for Azoff and Felder began negotiations that led to the consolidation of the Azoff action with the Eagles action. Apparently, arbitration was never mentioned. Azoff also sought and obtained a continuance of the trial date because he said he needed more

time for discovery. Azoff and the Eagle defendants agreed that the case should be tried to the respondent court commencing on January 31, 2005 and that date would not be continued. Azoff also participated in discovery. Felder subsequently dismissed his claim for dissolution of Eagles Ltd.

In August 2004, citing the arbitration clause in the Memorandum, Azoff moved to compel arbitration of the actions. Although Azoff was not a signatory to the Memorandum, he asserted he was a third party beneficiary of the agreement and therefore entitled to invoke the arbitration provision because Felder's claims against him constituted a dispute "arising out of or in connection with this agreement." Azoff claimed the alleged conspiracy between himself, Frey and Henley to oust Felder from the Eagles and deprive him of his due included "claims of breach of the 2000 Agreement and breach of fiduciary duty and constructive fraud connected to the agreement, as well as claims that the 2000 Agreement was the direct cause of his termination in February, 2001 and was a critical part of the whole conspiracy that is the basis for his claims against Azoff and the other defendants."

The Eagles defendants joined in Azoff's motion. Although they had not previously invoked their right to arbitration under the Memorandum, the Eagles defendants argued they were entitled to "reassess the applicability of the Preliminary 2000 Deal Memorandum's arbitration agreement to Felder's newly-configured case." By "newly configured case," the Eagles defendants meant Felder had "substantially changed the shape and nature of his lawsuit" against them by adding a new party (Azoff), dismissing his claim for dissolution of Eagles Ltd., and introducing into the consolidated cases "the concept of an overarching conspiracy . . . ."

In opposition to the motion, Felder contended that Azoff

and the Eagles defendants had waived the right to arbitrate. Felder argued that the Eagle defendants had opted to pursue litigation for three years and that Azoff filed a demurrer and motion to strike, litigated for seven months (including negotiations with Felder's counsel that resulted in consolidating all the actions), and requested a trial continuance because he purportedly needed more time to conduct discovery. As noted, Azoff and the Eagles defendants entered into a written stipulation that the case would be tried on January 31, 2005, and the date would not be continued.

On September 20, 2004, respondent court granted the motion to compel arbitration. The court did not specifically address the issue of the applicability of the arbitration clause to Felder's claims against Azoff. Rather, the court appears to have assumed the claims were arbitrable because it found Azoff had not waived his right to arbitrate within the seven-month period in which he had been a defendant in the case. The court found Azoff had timely filed his motion to arbitrate "as soon as his counsel were up to speed in the case," and had "taken no action to undermine or impair [Felder's] ability to take advantage of the benefits and efficiencies of arbitration." The court also noted Felder had taken three years to name Azoff as a defendant in the case. Finally, the court cited the strong public policy in favor of arbitration. Although respondent court found that Azoff had not waived his right to arbitration, it did not address Felder's waiver claim with respect to the Eagle defendants.

We conclude that the Eagle defendants and Azoff waived their right to arbitrate Felder's claims against them. Because of our conclusion, we need not address whether or not Azoff had a right to arbitrate as a third party beneficiary—a contention not raised by the Petition.

DISCUSSION

"Although a written agreement to arbitrate an existing or future dispute is generally enforceable, a petition to compel arbitration will be denied when the right has been waived by the proponent's failure to properly and timely assert it. (Code Civ. Proc., §§ 1281, 1281.2, subd. (a).) This may happen in a variety of contexts, ranging from situations in which the proponent of arbitration has previously taken steps inconsistent with an intent to invoke arbitration, to instances in which the proponent has unreasonably delayed in undertaking the procedure. There is no single determinative test of waiver, and the question for the trial court is one of fact. For us, the question is whether the trial court's decision is supported by substantial evidence. If it is, we must affirm. If not, we may decide the issue as a matter of law." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal. App. 4th 553, 557 (*Guess*).)[1]

It is the court, not the arbitrators, that determines the issue of waiver of arbitration by litigation conduct. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 964 [waiver as to "nonlitigation conduct" to be decided by the arbitrator].) It is true that in *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84, the United States Supreme Court said, "So too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability'" [quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* (1982) 460 U.S. 1, 24-25]. As one court said, "However, *Howsam* involved a determination of whether a period of limitation,

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[1] As the Supreme Court said, "the term 'waiver,' as used in the context of the failure to timely demand arbitration, refers not to a voluntary relinquishment of a known right, but to the loss of a right based on a failure to perform an obligation." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal. 4th 307, 314.)

imposed by the rules of the arbitrator, should be determined by the courts or by the arbitrator. As such, to the extent that the decision addresses waiver issues it is dicta. (*Scott v. First Union Securities, Inc.* (Sup. Ct. N.Y. 2003) 761 N.Y.S.2d 770, 771.) Moreover, the waiver to which *Howsam* referred can and should be construed as not the kind attributable to litigation conduct, which is more properly addressed by the court. Even assuming the Federal Arbitration Act, 9 U.S.C. section 1, et seq., applies notwithstanding the California choice-of-law clause (see *Mount Diablo Medical Center v. Health Net of California* (2002) 101 Cal.App.4th 711), neither *Cone* nor *Howsam* states that waiver issues *must* be decided by arbitrators. Indeed, many California waiver cases have been decided by courts after *Cone*. (See *Guess, supra,* 79 Cal.App.4th 553.)

In *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), the Supreme Court set forth the factors a court may consider in determining whether a party has waived its right to arbitration. These factors are: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "'the litigation machinery has been substantially invoked' and the parties were 'well into the preparation of a lawsuit' before one party notified the other of its intent to arbitrate; (3) whether a party either requested arbitration close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether 'important intervening steps' had occurred (such as a party availing itself of discovery not available in arbitration); and (6) whether the delay 'affected, misled, or prejudiced'" the party opposing arbitration. (*St. Agnes, supra,* 31 Cal.App.4th at p. 1196, citing *Sobremonte* v. *Superior Court* (1998) 61 Cal.App.4th 980, 992.)

In *Guess?, Inc. v. Superior Court, supra,* 79 Cal.App. 4th 553, the Court of Appeal ordered the issuance of a writ of

mandate directing the trial court to vacate its order granting defendant's motion to compel arbitration. The court held defendant had waived its right to enforce an arbitration clause in an agreement because (1) it knew about the arbitration provision before the lawsuit was even filed; (2) it answered the complaint and did not assert the arbitration clause as a defense; and (3) its other conduct in the lawsuit was "wholly inconsistent with its present desire to arbitrate." For months, defendant participated fully in the discovery process, objecting to plaintiff's discovery requests on a number of grounds but "never once suggesting that discovery should be barred because this dispute had to be arbitrated." Defendant "sent two sets of lawyers to the third-party depositions and took full advantage of every opportunity to cross-examine the deponents," but never suggested the depositions were inappropriate because the dispute should have been arbitrated. Thus, defendant was able to take "full advantage of the opportunity to test the validity of Guess's claims, both legally and factually, primarily at Guess's expense." The result was that the plaintiff, Guess, had suffered prejudice by being "exposed to the substantial expense of pretrial discovery and motions that would have been avoided had Kirkland timely and successfully asserted a right to arbitrate." (*Id.* at pp. 557-559.)

This case presents even a stronger case for waiver than that presented in *Guess?, Inc., supra,* 79 Cal.App.4th 553. Azoff, initially represented by the same counsel representing the Eagles defendants, challenged the pleadings, answered, asserted affirmative defenses without raising the arbitration clause, participated in months of discovery, negotiated and stipulated to the consolidation of actions that had been litigated for over three years, sought and obtained a continuance of the trial date for discovery purposes and to prepare for trial, and stipulated to the trial of the consolidated actions on January 31, 2005. During these proceedings,

Azoff gained access to the discovery that had taken place during the Eagles action. As to Azoff, almost all of the factors enumerated by the Supreme Court in *St. Agnes, supra,* 31 Cal.4th at 1196 militate in favor of waiver. Azoff's actions were inconsistent with the right to arbitrate; there had been substantial litigation activity before Azoff sought arbitration; the request for arbitration was close to a trial date; and Azoff took steps not available in arbitration. Felder was "affected, misled or prejudiced" (*St. Agnes, supra,* 31 Cal.4th at 992) by the delay and actions of Azoff. There is not sufficient evidence supporting the trial court's finding that Azoff did not waive arbitration.

The facts concerning the Eagles presents an even stronger case for waiver. Prior to their belated effort to invoke their right to arbitrate any claims of Felder under the Memorandum, the Eagles defendants filed a cross-complaint against Felder and vigorously litigated the now-consolidated cases for over three years. This intense litigation generated numerous court filings and thousands of pages of discovery. The Eagles defendants even brought a discovery motion in July 2004. Without a doubt, "the litigation machinery has been substantially invoked." (*Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 992.) Moreover, a mere four days prior to joining in Azoff's motion, the Eagles defendants stipulated that the case would be tried on January 31, 2005, that this was a firm date, and that no party would request a trial continuance. Felder's prejudice is demonstrated by the expenditure of hundreds of thousands of dollars in attorney's fees and participation in a costly discovery process that allowed the defendants to gain information about Felder's case that they could not have gained through arbitration. (See *Guess?, Inc. v. Superior Court, supra,* 79 Cal.App.4th at p. 558; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-215; *Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 995.) There is virtually no evidence that the Eagles

defendants did not waive arbitration.

The Eagles defendants' assert that they are entitled "revisit" their prior decision not to invoke their right to arbitration under the Memorandum because the circumstances of the litigation changed with the dismissal of the dissolution claim and the introduction of new claims against Azoff. The Eagles defendants rely primarily on *Keating v. Superior Court* (1982) 31 Cal.3d 584 (overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1, 5). *Keating* does not compel a finding of no waiver here. That case involved both individual and class actions by franchisees of 7-11 stores against the parent company, Southland Corp. The franchisees claimed Southland had waived its right to compel arbitration because it did not initially raise arbitration as a defense and removed the cases to federal court, an act the franchisees claimed was inconsistent with the right to arbitrate. The Supreme Court affirmed the trial court's finding of no waiver, noting Southland had moved promptly to remove the case and, upon remand, had asserted arbitration as an affirmative defense in its amended pleading. Most significant to this case, the court noted that prior to remand, "the only discovery which took place consisted of an exchange of documents to franchisees' benefit. . . . We discern no impropriety on the part of Southland, or prejudice to franchisees, in these brief transactions." (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 606.)

The action against Azoff did not materially change the action against the Eagles. Indeed, the parties agreed to consolidate the actions and to a trial date.

In view of the uncontradicted facts, the trial court's decision to compel arbitration, and therefore to find impliedly or expressly that there was no waiver of arbitration, is not supported by substantial evidence.

DISPOSITION

A peremptory writ shall issue directing respondent court to vacate it order of September 20, 2004, granting defendants' motions to compel arbitration, and enter a new and different order denying the motions. Costs are awarded to Felder.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPARTMENT 45

DON FELDER, Plaintiff vs.
IRVING AZOFF, et al., Defendants
BC 244814 [Consolidated with BC 249741 and BC 309927]

ORDER

The Court took under submission defendant Azoff's Motion To Compel Arbitration All Claims In the Consolidated Cases And To Stay Proceedings Pending the Outcome Of Arbitration. Having considered the parties' pleadings, the points and authorities cited, and oral arguments, the Court grants the defendant's Motion.

The principal question is whether defendant Azoff waived his right to arbitrate within the seven-month period in which he had been a defendant in the consolidated cases.

Prejudice is critical in a waiver determination. The record indicates that Azoff has taken no action to undermine or impair plaintiff's ability to take advantage of the benefits and efficiencies of arbitration. In fact, Plaintiff waited 3 years to include Azoff as a defendant. Azoff has done no discovery; instead it is plaintiff who had made discovery requests of Azoff. Thus, Azoff did not use the discovery process to gain information about plaintiff's case which he would not have gained in arbitration. Azoff timely filed a Motion to Arbitrate as soon as his counsel were up to speed in the case.

Finally, "... courts assess prejudice with the recognition that California's arbitration statutes reflect 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' and are intended 'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.'" (St. Agnes Medical Center v. Pacific Care of California, 31 Cal. 4th 1187, 1204).

WHEREFORE, the Court orders these consolidated cases to binding arbitration and stays all proceedings pending the outcome of arbitration.

SO ORDERED.

Dated: September 20, 2004

s/
MEL RED RECANA
Judge

APPENDIX C

Court of Appeal, Second Appellate District, Division Five
- No. B178402
S130769

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DON FELDER, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

EAGLES LTD et al., Real Parties in Interest.

Petitions for review DENIED.

SUPREME COURT
FILED
MAR 23 2005
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE
Chief Justice

APPENDIX D

PRELIMINARY 2000 DEAL MEMORANDUM

The following shall constitute an agreement (the "Preliminary 2000 Deal Memorandum"), dated as of August 31, 2000, among DON FELDER, GLENN FREY, DON HENLEY, TIMOTHY B. SCHMIT and JOE WALSH (individually, a "Member" and collectively, the "Members"), regarding certain activities of The Eagles (the "Group") hereinafter described. All capitalized terms not defined herein shall have the same meaning as under the Deal Memorandum dated as of March 15, 1994 among the Members, as amended (the "1994 Deal Memorandum").

WHEREAS, the Members desire to confirm their rights and obligations in connection with certain exploitations of recordings heretofore recorded by the Group, as presently or heretofore constituted, to be initiated in the year 2000;

NOW, THEREFORE, the parties agree as follows:

1. Box Set.

(a) To the extent that the written consent of the Members, or some of them, is required, each of the undersigned Members, acting individually and on behalf of any entity whose consent may be required and for which such Member has the authority to grant such consent [including, without limitation, Eagles, Ltd. ("LTD"), Eagles Touring Co. ("ETC"), Eagles Recording Co. ("ERC") and such Member's controlled music publishing company designee(s) ("Controlled Publisher(s)) hereby consents to, and grants the necessary rights to enable, the entry by N.E.A. LLC ("NEA"), a limited liability company co-owned by Glenn Frey and Don Henley, into an agreement (the "Elektra Box Set Agreement") with Elektra Entertainment Group Inc.

("Elektra") for the worldwide, perpetual rights to distribute and sell, on such terms and conditions as NEA shall negotiate with Elektra (subject to paragraph 3 below), a box set (the "Box Set") of Eagles Recordings consisting of four (4) CDs, three (3) of which (the "Catalogue CDs") will contain previously released masters (the particular such masters being substantially the same as those listed on the track listing attached as Schedule 1 hereto) and the final one (1) of which (the "Live CD") shall consist of live recordings selected by Glenn Frey and Don Henley from the live recordings recorded at the Eagles' December, 1999 concerts at Mandalay Bay and/or Staples Center, which live recordings were "sweetened" in additional recording sessions at which each of the Members performed in July, 2000.

(b) (i) Provided that the Elektra Box Set Agreement is consummated and until such time, if ever, as the "Final 2000 Deal Memorandum" (as defined in paragraph 4 below) is executed by the "Requisite Members", the compensation payable to the Members in respect of the Box Set shall be computed and determined in accordance with the principles reflected in Exhibit A attached hereto (entitled Eagles/Elektra; Box Set Income Projection; Summary of Net Amounts By Entity," and the attached explanatory notes. The Members acknowledge and agree that the amounts of revenue and expense set forth on Exhibit A are projections only and that no representation or warranty is being made with respect to whether the Elektra Box Set Agreement will be executed, whether the Box Set will or will not be released, or the quantities of sales of the Box Set, if released, which will be made or of the gross revenues which may be generated or of the expenses which may be incurred in connection with the Box Set or otherwise and that Exhibit A is only intended to show the Members' projected relative earnings, compared to each other, based on hypothetical sales and expense figures.

(ii) As used herein, the "Key Deal Terms" shall mean (A) the Members' relative earnings, compared to each other, which shall be as shown on Exhibits A and B hereto; (B) the advances payable to each Member upon the release, if any, of the Box Set and Millennium Album, which shall be not less than the amounts stated in paragraphs 1(c) and 2(c), respectively; and (C) the "Minimum Deal Terms" stated in paragraph 3 below, as applicable. As used in paragraph 1(b)(i) above and paragraph 2(b) below, the term "requisite Members" shall mean: (A) if the Final 2000 Deal Memorandum incorporates all of the Key Deal Terms, a majority of the Members; or (B) if the Final 2000 Deal Memorandum incorporates any change to any of the Key Deal Terms which is adverse to any Member, all of the Members.

(c) The Members acknowledge that the aggregate advance offered by Elektra to NEA in respect of the Box Set is Three Million Five Hundred Eighty-Five Thousand Dollars ($3,585,000). Notwithstanding Exhibit A, but subject to paragraph 3 below, the Members agree that a fully-recoupable advance shall be paid to each of Don Felder, Timothy B. Schmit and Joe Walsh in an amount equal to one-seventh (1/7) of eighty-five percent (85%) of the aggregate such advance actually paid by Elektra to NEA, a fully recoupable advance shall be paid to each of Don Henley and Glenn Frey in an amount equal to two-sevenths (2/7ths) of eighty-five percent (85%) thereof, and the remaining fifteen percent (15%) thereof shall be paid to Irving Azoff as management commissions, payable in each case if, as and when such advance is paid by Elektra.

2. <u>The Millennium Album</u>:

(a) To the extent that the written consent of the Members, or some of them, is required, each of the undersigned Members, acting individually and on behalf of

any entity whose consent may be required and for which such Member has the authority to grant such consent (including, without limitation, LTD, ETC, ERC and such Member's controlled music publishing company designee) hereby consents to, and grants the necessary rights to enable, the entry by NEA into an agreement with Giant Records ("Giant") for the United States and Canada (the "Giant Agreement") and an agreement with Warner Music International ("WMI") for the rest of the world (the "WMI Agreement") for the rights to distribute and sell, on such terms and conditions as NEA shall negotiate with Giant and WMI (subject to paragraph 3 below), a single disc (or equivalent) album (the "Millennium Album") of recordings under the artist name "The Eagles" which shall consist primarily of live recordings selected by Glenn Frey and Don Henley from the live recordings recorded at the Eagles' December 1999 concerts at Mandalay Bay and/or Staples Center and "sweetened," as aforesaid, and which may include, at their election, up to four (4) new studio recordings.

(b) Provided that the Giant Agreement and the WMI Agreements are consummated and until such time, if ever, as the "Final 2000 Deal Memorandum" (as defined in paragraph 4 below) is executed by the "requisite Members," the compensation payable to the Members in respect of the Millennium Album shall be computed and determined in accordance with the principles reflected in Exhibit B attached hereto (entitled Eagles/Giant Records; Millennium Live CD Income Projections; Summary of Net Amounts By Entity; and the attached explanatory notes. The Members acknowledge and agree that the amounts of revenue and expense set forth on Exhibit B are projections only and that no representation or warranty is being made with respect to whether the Giant Agreement or the WMI Agreement will be executed, whether the Millennium Album will or will not be released, or the quantities of sales of the Millennium Album,

if released, which will be made or of the gross revenues which may be generated or of the expenses which may be incurred in connection with the Millennium Album and that Exhibit B is only intended to show the Members' projected relative earnings, compared to each other, based on hypothetical sales and expense figures, which figures assume (without any representation or warranty) that all of the Members will have performed on all of the recordings contained therein.

(c) The Members acknowledge that the aggregate advance offered by WMI to NEA or its designee in respect of the Millennium Album is One Million Dollars ($1,000,000) if it contains no new studio recordings or One Million Five Hundred Thousand Dollars ($1,500,000) if it contains two (2) new studio recordings. Provided that NEA authorizes WMI to release the Millennium Album, and subject to paragraph 3 below, the Members agree that a fully recoupable advance shall be paid to each of Don Felder, Timothy B. Schmit and Joe Walsh in an amount equal to one-seventh (1/7) of eighty-five percent (85%) of the aggregate such advance actually paid by WMI to NEA, a fully recoupable advance shall be paid to each of Don Henley and Glenn Frey in an amount equal to two-sevenths (2/7ths) of eighty-five percent (85%) thereof, and the remaining fifteen percent (15%) thereof shall be paid to Irving Azoff as management commissions, payable in each case if, as and when such advance is paid by WMI.

3. Minimum Deal Terms of Agreements With Third Parties. Notwithstanding anything to the contrary in paragraphs 1 or 2 above, but without establishing any precedent as to how many or which Members' approval needs to be obtained in order for any particular exploitation of new or existing recordings to be released under the artist name "The Eagles," this Preliminary 2000 Deal Memorandum does not authorize NEA, Don Henley and/or

Glenn Frey or any other entity owned or controlled by either of them (for this purpose, the "Contracting Eagles Entity") to agree with the applicable third party to any term less favorable to the Contracting Eagles Entity than any of the following terms (the "Minimum Deal Terms"), as applicable, without the prior written consent of all of the Members:

(a) in or in connection with the Elektra Box Set Agreement:

(i) an advance in respect of the delivery to and release by Elektra of the Box Set, of Three Million Five Hundred Eighty-Five Thousand Dollars ($3,585,000);

(ii) a basic royalty rate in respect of top line, full price, sales of the Catalog CDs contained in the Box Set of (A) 22% of the retail base price for the U.S.A. and Canada and (B) 20% of the retail base price outside the U.S.A. and Canada (which rate may be converted to a percentage of the dealer price on such terms as NEA and Elektra shall negotiate);

(iii) basic payment terms for U.S.A. sales of the Live CD as contained in the Box Set on a "P&D" basis with a distribution fee of 22%, and a basic royalty rate in respect of top line, full price sales outside the U.S.A. of the Live CD as contained in the Box Set of 23% of the retail base price (which rate may be converted to a percentage of the dealer price on such terms as NEA and Elektra shall negotiate);

(iv) a suggested retail list price ("SRLP") for the initial release of the Box Set in the U.S.A. of $59.98; and

(v) mechanical royalties payable for U.S.A. sales of the Catalog CDs to the Box Set at a basic rate of the minimum statutory rate as of the date of initial release thereof ("M.S.R.")with a cap of 36 x M.S.R.

(b) in or in connection with the Giant Agreement basic payment terms in respect of U.S.A. sales of the

Millennium Album on a "P&D" basis with a distribution fee of 22%; or

(c) in or in connection with the WMI Agreement:

(i) an advance in respect of the delivery to and release by WMI of the Millennium Album of One Million Dollars ($1,000,000) if it contains no new studio recordings or One Million Five Hundred Thousand Dollars ($1,500,000) if it contains two (2) new studio recordings; or

(ii) a basic royalty rate in respect of top-line, full price sales of the Millennium Album in CD configuration of 23% of the retail base price (which rate may be converted to a percentage of dealer price on such terms as NEA and WMI shall negotiate).

4. Miscellaneous.

(a) Each Member shall have direct, equal and independent rights to examine the books and records of NEA, the Eagles Entities and any other entity (if any) owned or controlled by any of the Members which is utilized to implement the terms hereof. The Giant Agreement will provide to NEA customary and reasonable audit rights with respect to the books and records of Giant pertaining to the Millennium Album and the Live CD, and, for the purposes of the immediately preceding sentence, the books and records of NEA shall be deemed to include such information as NEA may obtain from Giant's books and records concerning the Millennium Album and the Live CD, as applicable. If NEA fails or declines to audit any particular statement from Giant or WMI, any Member shall have the right to trigger such audit at that Member's expense, subject to reimbursement from any recovery from such audit. Upon request, NEA shall furnish to each Member a copy of each royalty or distribution statement received by NEA from Giant, Elektra, WMI or any other distributor or licensee of the Box Set or Millennium Album.

(b) This Preliminary 2000 Deal Memorandum does not authorize the entry into any agreements for the performance of concerts by The Eagles or for the exploitation of so-called merchandising rights with respect to the Eagles.

(c) Nothing in this Preliminary 2000 Deal Memorandum is intended to change the rights, if any, of any Member or Members or of any Eagles Entity with respect to ownership and control of the name "The Eagles."

(d) Any excess mechanical royalty payments (*i.e.*, required to be paid to publishers, but either not paid by Elektra or paid by Elektra and deducted from payments otherwise owed to NEA, any Eagles Entity or any Controlled Publisher(s)) will be paid and deducted from the "Override" described in Exhibit A.

(e) Mechanical royalties on copies of the Live CD and Millennium Album distributed on a "P&D" basis will be paid at the full statutory rate or the minimum statutory rate, as NEA shall decide, and on such other terms as NEA shall determine in its good faith judgment.

5. Consent to Representation of Adverse Interests; Waiver of Claims.

(a) Frey and Henley have engaged Manatt, Phelps & Phillips LLP ("MPP") to prepare and negotiate this Preliminary Deal Memorandum and the Final 2000 Deal Memorandum (as defined in paragraph 4 below) on their behalf and to prepare and negotiate, on behalf of Eagles Ltd., the New Companies, and NEA, as applicable, any other agreements necessary or desirable to be prepared and negotiated in connection with the subject matter hereof.

(b) Each of the other Members acknowledges and agrees that he has been advised to obtain his own independent legal counsel to advise him in connection with this Preliminary Deal Memorandum and the Final Deal

Memorandum, and such Member has either voluntarily chosen to obtain same or voluntarily chosen not to do so. Each Member's attorney in connection with this Preliminary Deal Memorandum and the Final Deal Memorandum is listed in paragraph 7 below.

(c) No attorney is representing the Group in connection with the negotiation of this Preliminary Deal Memorandum or the Final Deal Memorandum.

(d) Each of the Members acknowledges that MPP currently represents, or has heretofore represented, the following parties or related individuals or entities: (i) each of Henley and Frey in certain of their individual activities; (ii) NEA; (iii) various Eagles-related entities (individually an "Eagles Entity" and collectively "Eagles Entities"), including LTD, ETC, ERC and Eagles Merchandising Co.; (iv) Joe Walsh; and (v) Irving Azoff and his affiliated entities (including Giant Records).

(e) Each Member hereby irrevocably consents to MPP's concurrent representation of its above-named clients (including Joe Walsh) in connection with all matters described herein and agrees that such Member shall not make any claim that MPP or any attorney or legal assistant affiliated with MPP breached any duty of loyalty or other fiduciary duty to such Member or any of the Eagles Entities or to any other person or entity in connection with the matters which are the subject matter hereof.

(f) Each Member likewise waives any and all claims in the nature of conflict of interest, breach of duty of loyalty or breach of other fiduciary duty against (i) each other Member and each Eagles Entity; (ii) Irving Azoff and all companies owned or controlled by him (collectively "Azoff"); and (iii) Gelfand, Rennert & Feldman (collectively "GRF") and all employees, shareholders, partners, directors or other representatives thereof, arising out of or in

connection with their roles in connection with this agreement and the subject matter hereof.

(g) Without limitation of the foregoing, each Member likewise expressly waives any and all claims against each other, each Eagles Entity, Azoff, MPP, GRF and their designees that this agreement is void, voidable or unenforceable, or that its execution or performance gives rise to a claim for damages, by reason of duress, undue influence, breach of duty, improper threat, improper methods or otherwise. Each Member expressly acknowledges that he enters into this agreement freely, voluntarily, based on full and adequate information and after having had an opportunity to consult with counsel as aforesaid.

(h) Nothing contained herein shall be deemed to determine or affect in any manner whatsoever the rights of the Members or any Eagles Entity to terminate a Member as a member of the Group or as an owner or income participant in any Eagles Entity or the rights or remedies of any Member in the event of any such termination or purported termination occurring after the date hereof. In the event of any such termination or purported termination occurring after the date hereof, the validity or invalidity of such termination or purported termination and the rights and remedies of such Member and of the applicable Eagles Entities in connection with such termination or purported termination shall not be affected by any provision of this agreement, except that such rights and remedies shall not include rescission, cancellation or termination of this agreement, nor shall they modify the rights, obligations or compensation of the Members with respect to the Box Set and the Millennium Album.

6. Binding Agreement. This constitutes a binding agreement among the parties hereto, and the Members expressly acknowledge that in entering into the agreements with third parties contemplated hereby, including Elektra, Giant and WMI, and by incurring expenses in connection

with the subject matter hereof, NEA, Don Henley and Glenn Frey will be acting in material and detrimental reliance hereon. The parties intend to enter into a more detailed agreement with respect to the subject matter hereof, the terms of which, to the extent not fully set forth herein, shall be negotiated in good faith among the Members. Until such time, if ever, as such more detailed agreement (the "Final 2000 Deal Memorandum") shall be executed by the parties hereto, this agreement shall be deemed to form a binding agreement with respect to the subject matter hereof. In order to induce the other Members to enter into this agreement, each Member represents and warrants to the other Members (a) that (other than the agreements referred to herein and other pre-existing written agreements indirectly pertaining to the Box Set and/or Millennium Album, such as the various Eagles recording agreements with Elektra and Geffen and the agreements for the performance of the concerts at which the subject "live" recordings were recorded) this agreement is the sole agreement between and/or among the parties pertaining to the Box Set and/or the Millennium Album, and (b) that he has neither offered to any other Member(s) or any representative(s) thereof, including Azoff, nor been offered by any other Member(s) or any representative(s) thereof, including Azoff, any financial consideration or other material consideration of any nature whatsoever, other than what is stated herein and what is stated or implied in Exhibits A and B attached hereto, in order to induce such Member to enter into this agreement. No Member shall refuse to render his services to the extent such services are reasonably necessary to implement this agreement and no Member shall make any claim that NEA, Don Henley, Glenn Frey or any other entity designated by them lacked the consent of such Member to take any action reasonably necessary or desirable to implement the terms hereof. Each of the Members shall execute such other documents as he may be reasonably requested to execute to implement the terms hereof. This

agreement shall be governed by the laws of the State of California without regard to its choice-of-law principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum.

7. Notices. All notices which any party desires to send to any other party or parties hereunder shall be sent by fax (to the Member designated below), by certified mail, return receipt requested, by personal delivery or by Federal Express or other overnight delivery service regularly providing proof of delivery, as follows:

Don Henley
c/o Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
Attn: L. Lee Phillips, Esq.
Lawrence J. Blake, Esq.
Fax # (310) 312-1224

Don Felder
c/o Barry Tyerman, Esq.
Armstrong, Hirsch, Jackoway, Tyerman & Wertheimer
1888 Century Park East, 18th Floor
Los Angeles, CA 90067-1722
Fax # (310) 551-4448

Glenn Frey
c/o Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
Attn: L. Lee Phillips, Esq.
Lawrence J. Blake, Esq.
Fax # (310) 312-4224

Timothy B. Schmit
c/o Jeffrey Taylor Light, Esq.
Myman, Abell, Fineman, Greenspan & Light
11777 San Vicente Boulevard
Los Angeles, CA 90049-5061
Fax # (310) 207-2680

Joe Walsh

with a copy of notices to Joe

c/o Wallace D. Franson
Jess S. Morgan & Co.
5750 Wilshire Boulevard,
Suite 590
Los Angeles, CA 90036
Fax # (323) 937-6532

Walsh to:

Scott D. Harrington, Esq.
Manatt, Phelps & Phillips
LLP
11355 W. Olympic Boulevard
Los Angeles, CA 90064
Fax # (310) 312-4224

8. Counterparts. This agreement may be executed in counterparts, and facsimile signatures shall be deemed as valid as original signatures.

IN WITNESS WHEREOF, the parties have indicated their agreement to the terms and conditions hereof by signing below. EACH MEMBER ACKNOWLEDGES THAT THE ATTORNEY REPRESENTING SUCH MEMBER HAS EXPLAINED THE TERMS AND CONDITIONS HEREOF, INCLUDING THOSE REGARDING SUCH MEMBER'S CONSENT TO THE REPRESENTATION OF ADVERSE INTERESTS AND WAIVER OF CLAIMS, TO SUCH MEMBER.

/s/
DON HENLEY, individually and on behalf of NEA, LLC and any and all applicable Eagles Entities and his Controlled Publisher(s)

GLENN FREY, individually and on behalf of NEA, LLC and any and all applicable Eagles Entities and his Controlled Publisher(s)

/s/
DON FELDER individually and on behalf of Eagles Ltd. and his Controlled Publisher(s)

TIMOTHY B. SCHMIT, individually and on behalf of his Controlled Publisher(s)

JOE WALSH, individually and on behalf of his Controlled Publisher(s)

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individually and on behalf of his Controlled Publisher(s)

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JOE WALSH, individually and on behalf of his Controlled Publisher(s)

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/s/ _____

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JOE WALSH, individually and on behalf of his Controlled Publisher(s)

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_____
TIMOTHY B. SCHMIT, individually and on behalf of his Controlled Publisher(s)

/s/_____
JOE WALSH, individually and on behalf of his Controlled Publisher(s)

(2)

No. 04-1713

Supreme Court, U.S.
FILED
AUG 15 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC AND IRVING AZOFF,

Petitioners,

v.

DON FELDER,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

LOUIS R. MILLER
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CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP
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SUMMARY AND COUNTER-STATEMENT OF THE CASE

In an unpublished unanimous opinion, which the California Supreme Court declined to review, the California Court of Appeal applied established California law to find that the Eagles Defendants and Irving Azoff (collectively herein "petitioners"), by their litigation conduct, waived any right they might have had to arbitrate respondent's claims against them. The decision does not conflict with applicable federal precedent. In short, no basis exists for this Court's interest in the case or its outcome.

Petitioners' statement of the case ignores the critical facts on which the California Court of Appeal based its decision. (*See* Appendix at 2a-5a and 8a-10a.) As the Court of Appeal found, the undisputed evidence established that petitioners aggressively litigated the complaints brought against them by plaintiff and respondent Don Felder ("Felder") in Los Angeles Superior Court for more than three years. Then, on the eve of trial, after years of written discovery comprising thousands of pages, extensive law and motion practice, twelve depositions, multiple status conferences, trial continuances, consolidation of the pending actions, and a stipulation to a firm trial date, petitioners moved to compel arbitration. As the Court of Appeal stated, "[t]here is virtually no evidence that the Eagles Defendants did not waive arbitration." (Appendix 9a-10a.)

No significant issue for this Court is presented by petitioners. Even if petitioners were correct – and they are not – that the question of waiver by litigation conduct should have been submitted to an arbitrator and not decided by the courts, such a submission in this case

would result only in delay. No decision maker, whether court or arbitrator, could fail to find waiver under the undisputed facts in this case.

Moreover, the decision by the California Court of Appeal does not conflict with this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), nor is there a conflict among the Circuit Courts that requires resolution. The clear weight of applicable authority is that waiver of arbitration by litigation conduct, as in the instant case, is an issue properly decided by the courts.

Respondent Don Felder ("Felder") was the lead guitarist of the Eagles band for 25 years, until he was wrongfully ousted from the band in February 2001. Felder was and is a one-third owner of Eagles Ltd., the company that owns the Eagles name and trademark. Felder composed the music for the Eagles' most famous song, "Hotel California," as well as other songs.

Felder brought two actions (the "Eagles Actions") in 2001 against Don Henley and Glenn Frey ("the Eagles Defendants"), who are petitioners herein, and who are the other one-third owners of Eagles, Ltd. and are the principal singers and composers in the band. The two Eagles Actions against Henley and Frey and various entities they created to receive the revenues of the Eagles' touring, recording and merchandising activities alleged that Felder had been wrongfully ousted from the band in breach of an agreement that Felder would only be removed from the band for cause and in order to deprive Felder of his rights to share in the revenues of the band as a one-third owner.

After the two Eagles Actions were consolidated, they were aggressively litigated by Felder and the Eagles Defendants (Henley, Frey and the related Eagles entities)

for three and one-half years. Although the Eagles Defendants were fully aware that one of the agreements among the band members – the Preliminary 2000 Deal Memorandum (attached in the Appendix at 15a) – contained a reference to arbitration,[1] they elected through their counsel to pursue their defense in the Los Angeles County Superior Court, and not in arbitration. Thus, the Eagles Defendants answered the complaints against them asserting 15 affirmative defenses, none of which made any reference to a claimed right to arbitrate the dispute. The Eagles Defendants have never contended that they were unaware of the purported arbitration clause. Rather, they made a decision to pursue the litigation through the courts.

The Eagles Defendants took and defended 12 depositions, comprising more than 4,300 pages, including five full days of Felder's deposition taken by the Eagles Defendants. In addition, the Eagles Defendants propounded two massive sets of document requests, one set of requests for admissions, three sets of form interrogatories, and one set of special interrogatories exploring in detail all of the legal theories, facts, documents, and witnesses upon which Felder relied. As late as July 1, 2004, the Eagles Defendants moved to compel further responses to their second

[1] The arbitration clause on which petitioners rely herein is unintelligible when read in its entirety: "This agreement shall be governed by the laws of the State of California without regard to its choice-of-law principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum." Appendix 25a-26a. Petitioners' quotation of a portion of that paragraph only is designed to bolster their claim that the arbitration clause is clear and expansive. It is anything but.

set of requests for admissions, third set of form interrogatories, and first set of special interrogatories.

The Eagles Defendants also filed their own cross-complaint against Felder in August 2002, alleging that Felder intended to write a book about the Eagles and that that would violate a confidentiality provision in the 1994 Deal Memorandum among the band members. That cross-complaint is still pending in the action.

On June 14, 2004, Felder voluntarily dismissed without prejudice the prayer in his second amended complaint for dissolution of Eagles, Ltd., leaving to be tried in the Eagles Actions his causes of action for breach of an implied-in-fact employment contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief.

On January 30, 2004, Felder filed a separate action against petitioner Irving Azoff, the manager of the Eagles, for breach of fiduciary duties and constructive fraud (the "Azoff Action"). Felder alleged that Azoff owed fiduciary duties to him as the manager of the Eagles and as his manager and that Azoff breached those duties by conspiring with Henley and Frey to orchestrate Felder's ouster from the band and by favoring the interests of Henley, Frey and Azoff over the interests of Felder.

In February of 2004, O'Melveny & Myers – the same attorneys who had represented the Eagles Defendants since February 2001 – appeared on behalf of Azoff. With full knowledge that the Eagles Actions had been litigated for three years and were pending for trial, Azoff stipulated that the Azoff Action should be consolidated for all further proceedings with the Eagles Actions, and the Superior Court so ordered on March 10, 2004. Neither the Eagles

Defendants nor Azoff made any mention of any claimed right to arbitration.

Azoff then followed the same litigation course as had the Eagles Defendants before him. He moved to strike allegations from the Azoff Action and demurred to the complaint, arguing that Azoff was not Felder's manager and owed no fiduciary duties to him. After his demurrer was overruled, Azoff answered the complaint against him, asserting 15 affirmative defenses which never even mentioned a claimed right to arbitration.

At a hearing on May 3, 2004 in the Superior Court, Azoff sought a continuance of the trial in the consolidated action from August 16, 2004 to spring 2005. The basis for Azoff's request was that Azoff needed more time to conduct discovery since he had only been named as a defendant on January 30, 2004. There was no suggestion that the consolidated action should be arbitrated. To the contrary, Azoff and the Eagles Defendants agreed expressly that the case should be tried in the Superior Court and agreed that the trial date would be January 31, 2005.

Although Azoff did not propound his own written discovery in the Azoff Action in addition to the massive written discovery propounded by the Eagles Defendants in the Eagles Actions, Azoff did schedule depositions of Felder and others and responded to Felder's written discovery. In those responses, Azoff asserted numerous objections which never raised a claim to arbitration.

In July 2004, new counsel for Azoff substituted into the case in place of O'Melveny & Myers, which continued to represent the Eagles Defendants. Azoff's new counsel, Kaye Scholer, asked for a continuance of Azoff's deposition, then scheduled for July 13, 2004, to provide more

time to prepare for the deposition. All parties in the consolidated action then entered into a written stipulation, which continued Azoff's deposition to August 11, 2004, confirmed the dates for the deposition of Felder and others in late September 2004, and confirmed in writing the agreement of all parties in the consolidated action that the January 31, 2005 trial date was "firm" and would not be continued. The Superior Court entered its order on the stipulation on August 5, 2004.

Azoff's new counsel conceded at a hearing on August 9, 2004 that his file consisted of 27 boxes and included the discovery taken in the Eagles Actions. Nevertheless, on that same date, Azoff, through his new counsel, for the first time, filed a motion to compel arbitration of all claims in the consolidated action. The right to arbitration was claimed under the purported arbitration clause in the Preliminary 2000 Deal Memorandum. (*See* footnote 1, *supra.*) Although the purported arbitration agreement stated that the right to arbitrate was "further specified in the 1994 Deal Memorandum," the 1994 Deal Memorandum made no reference whatsoever to arbitration. Also, on August 9, 2004, the Eagles Defendants joined in Azoff's motion to compel arbitration of all claims in the consolidated action.

The motion to compel arbitration by Azoff and the Eagles Defendants was heard in the Superior Court on September 15, 2004. On September 20, 2004, the court issued its ruling, ordering the consolidated cases to binding arbitration and staying all proceedings pending the outcome of arbitration. The court found that Azoff had not waived his right to arbitrate because his motion was timely, he had not conducted any discovery of his own, and plaintiff had suffered no prejudice from Azoff's actions.

The court's ruling said nothing about the litigation of the Eagles Actions, any prejudice to Felder from the three and one-half years of litigation of the Eagles Actions by the same counsel who had represented Azoff, the stipulation to consolidate the Eagles Actions and the Azoff Action, or the stipulation and court order to try the consolidated action in respondent court on January 30, 2005. (Appendix at 12a-13a).

The above-stated facts are not in dispute and are set forth in a verified petition for writ of mandate, which was filed by Felder in the California Court of Appeal on October 12, 2004. For the convenience of the Court, that verified petition for writ of mandate is attached hereto as Respondent's Appendix at pages 1a-15a.

After full briefing and oral argument, the California Court of Appeal issued a peremptory writ of mandate compelling the Superior Court to vacate its order compelling arbitration of the consolidated action. The Court of Appeal found that the Eagles Defendants and Azoff, with full knowledge of the purported arbitration clause, had waived any right they might have had to arbitrate the disputes against them by their litigation conduct, which was entirely inconsistent with any claimed right to arbitration. The decision was unanimous and unpublished. Thereafter, the California Supreme Court denied petitioners' petition for review of the decision of the Court of Appeal. (Appendix at 14a.)

After the remittitur issued on March 23, 2005, the Superior Court set a status conference to reset the case for trial. After initially setting the trial of the consolidated action on November 7, 2005, the Superior Court heard a motion from the Eagles Defendants to continue the trial to

September 2006 because of the claim that trial counsel at O'Melveny & Myers was engaged in preparation for another trial that would prevent his representation of the Eagles Defendants in the trial in November. Over Felder's vigorous objection, the trial of the consolidated action was continued to September 6, 2006.

REASONS FOR DENYING THE WRIT

I. Petitioners, By Their Litigation Conduct, Unquestionably Waived Their Right To Arbitrate.

The undisputed facts set forth above and summarized by the Court of Appeal in its decision (Appendix 8a-10a) establish that the Eagles Defendants and Azoff waived any right they might have had to arbitrate the claims against them. As the Court of Appeal found, this was not a close case. The Eagles Defendants and Azoff engaged in extensive litigation conduct wholly inconsistent with the right to arbitrate and to the substantial prejudice of Felder.

In reaching its result, the Court of Appeal applied established California law. It cited and relied upon *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal.4th 1187 (2003) (*St. Agnes*). There, the California Supreme Court confirmed the factors to be considered by the trial courts in assessing waiver claims based on litigation conduct: (1) whether the conduct of the parties was inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties were "well into the preparation of a lawsuit" before one party notified the other of its intent to arbitrate; (3) whether a party either requested arbitration close to the trial date or delayed for a long period before seeking a

stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether "important intervening steps" had occurred (such as a party availing itself of discovery not available in arbitration); and (6) whether the delay "affected, misled, or prejudiced" the party opposing arbitration. (*St. Agnes, supra,* 31 Cal.App.4th at 1196, citing *Sobremonte v. Superior Court*, 61 Cal.App.4th 980, 992 (1998)).

The Court of Appeal also relied on its own decision in *Guess?, Inc. v. Superior Court*, 79 Cal.App.4th 553 (2000). In *Guess?, Inc.* the Court of Appeal ordered the issuance of a writ of mandate directing the trial court to vacate its order granting defendant's motion to compel arbitration. The court held that defendant had waived any right to enforce an arbitration clause in an agreement because (1) it knew about the arbitration provision before the lawsuit was even filed; (2) it answered the complaint and did not assert the arbitration clause as a defense; and (3) its other conduct in the lawsuit was "wholly inconsistent with its present desire to arbitrate." (*Id.* at pp. 557-559.)

The Court of Appeal in the instant case determined correctly that Azoff and the Eagles Defendants had waived arbitration based on the clear precedent in *Guess?, Inc.* and *St. Agnes*: "This case presents even a stronger case for waiver than that presented in *Guess?, Inc. supra,* 79 Cal.App.4th 553. Azoff, initially represented by the same counsel representing the Eagles defendants, challenged the pleadings, answered, asserted affirmative defenses without raising the arbitration clause, participated in months of discovery, negotiated and stipulated to the consolidation of actions that had been litigated for over three years, sought and obtained a continuance of the trial date for discovery purposes and to prepare for trial, and

stipulated to the trial of the consolidated actions on January 31, 2005. During these proceedings, Azoff gained access to the discovery that had taken place during the Eagles action. As to Azoff, almost all of the factors enumerated by the Supreme Court in *St. Agnes, supra,* 31 Cal.4th at 1196 militate in favor of waiver. Azoff's actions were inconsistent with the right to arbitrate; there had been substantial litigation activity before Azoff sought arbitration; the request for arbitration was close to a trial date; and Azoff took steps not available in arbitration. Felder was 'affected, misled or prejudiced' (*St. Agnes, supra,* 31 Cal.4th at 992) by the delay and actions of Azoff. There is not sufficient evidence supporting the trial court's finding that Azoff did not waive arbitration.

"The facts concerning the Eagles presents an even stronger case for waiver. Prior to their belated effort to invoke their right to arbitrate any claims of Felder under the Memorandum, the Eagles defendants filed a cross-complaint against Felder and vigorously litigated the now-consolidated cases for over three years. This intense litigation generated numerous court filings and thousands of pages of discovery. The Eagles defendants even brought a discovery motion in July 2004. Without a doubt, 'the litigation machinery has been substantially invoked.' (*Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 992.) Moreover, a mere four days prior to joining in Azoff's motion, the Eagles defendants stipulated that the case would be tried on January 31, 2005, that this was a firm date, and that no party would request a trial continuance. Felder's prejudice is demonstrated by the expenditure of hundreds of thousands of dollars in attorney's fees and participation in a costly discovery process that allowed the defendants to gain information about Felder's case that

they could not have gained through arbitration. (*See Guess?, Inc. v. Superior Court, supra,* 79 Cal.App.4th at p. 558; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-215; *Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 995.) There is virtually no evidence that the Eagles defendants did not waive arbitration." (Appendix at 8a-10a.)

II. Granting The Petition Would Result Only In Unconscionable Delay.

If this Court were to issue the requested writ, take the case, and rule that the question of waiver by litigation conduct must be determined by the arbitrator, and not the courts, the only result would be delay and inefficiency. Ultimately, an arbitrator, after reviewing the same undisputed facts, would have to find that petitioners had waived arbitration by their litigation conduct and would again remand the case to the Los Angeles Superior Court for trial. Years would have passed and the case would be no closer to resolution on the merits.

The First Circuit Court of Appeals reached the same conclusion in *Marie v. Allied Home Mortgage Corp.,* 402 F.3d 1 (1st Cir. 2005):

> "Finally, sending waiver claims to the arbitrator would be exceptionally inefficient. A waiver defense is raised by one party to a lawsuit in response to another party's motion to compel arbitration or stay judicial proceedings on the basis of an arbitration agreement signed by the parties. If the arbitrator were to find that the defendant had waived its right to arbitrate, then the case would inevitably end up back before the district court with the plaintiff again pressing his

claims. The case would have bounced back and forth between tribunals without making any progress. [Citations]

"This is different in kind from the arbitrator's normal resolution of a gateway issue: normally, the resolution of such an issue would bar not only arbitration but any sort of litigation on the issues by either side. Thus, allowing courts to decide waiver issues – at least when due to litigation-related activity – furthers a key purpose of the FAA: to permit speedy resolution of disputes." (*Id.* at 13-14.)

III. The Clear Weight Of Authority Is That Waiver By Litigation Conduct Is Properly Decided By The Courts.

Petitioners claim that they are presenting to this Court an important issue of federal law on which this Court has ruled and the Circuit Courts are divided. The claim is without substance.

As this Court knows better than counsel, *Howsam, supra,* 539 U.S. 79, did not involve a claim of waiver by litigation conduct at all. Rather, it concerned the application of the six-year limitations period contained within the arbitration rules under which the parties had agreed to arbitrate. This Court held that the application of that contractual limitation was for the arbitrator, and not the courts. In its well-reasoned opinion, in *Marie v. Allied Home Mortgage Corp., supra,* 402 F.3d 1, the First Circuit Court of Appeals held that *Howsam* did not require that the issue of waiver by litigation conduct be decided by the arbitrator. To the contrary, that issue was not presumptively within the expertise of the arbitrator because it did

not arise out of the language of the arbitration agreement or the arbitration rules. As the Court in *Marie* found:

> "[T]he comparative expertise considerations expressed in *Howsam* and *Green Tree* [*Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003)] argue for judges to decide this issue. [Citations] Judges are well-trained to recognize abusive forum shopping. [Citations] As well, the inquiry heavily implicates 'judicial procedures,' which *Green Tree* suggests should be an important factor in presuming that an issue is for the court. [Citation] Further, the procedural waiver issue is not likely to be intertwined with the merits of the dispute." (402 F.3d at 13)

Therefore, the First Circuit correctly held as follows:

> "We hold that the Supreme Court in *Howsam* and *Green Tree* did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court." (*Id.* at 14)

The California Court of Appeal applied the same traditional rule in the instant case. It used its expertise to reject the abusive forum shopping by the Eagles Defendants and Azoff which was evident in their effort to send to arbitration the consolidated action after it had been litigated for more than three years.

Petitioners cite to no well-reasoned authority[2] holding that a court must send to an arbitrator the question

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[2] The case cited by petitioners to show a conflict in the Circuits is *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.,* 328 F.3d 462, 466 (8th Cir. 2003). However, that decision relies on a single sentence of *Howsam* taken out of context and is devoid of analysis.

(Continued on following page)

whether litigation conduct in that very court waived the right to arbitrate. That question is peculiarly within the expertise of the court, and not the normal "gateway" issue reserved to the arbitrator in *Howsam* and *Green Tree*. *See Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed.Appx. 462, 464 (5th Cir. 2004).

IV. The Decision Below Does Not Conflict With The Policy Underlying The Federal Arbitration Act.

As discussed above, no policy of the Federal Arbitration Act ("FAA") and no authority mandates that parties, after aggressively litigating a case for years in the courts, should be able to shift the forum to arbitration because it suits their new strategy. To the contrary, as discussed in *Howsam* and *Marie*, the policy underlying the FAA favors decision by the court of issues of waiver by litigation conduct occurring in that court. 539 U.S. at 85; 402 F.3d at 13-14.

Furthermore, in the instant case, the policy underlying the FAA is not at issue because the parties did not agree unequivocally that their disputes should be arbitrated. The arbitration clause on which petitioners rely, when read in its entirety, is unintelligible; and the Preliminary 2000 Deal Memorandum, which contains the purported arbitration clause, is only tangentially related to the claims against the Eagles Defendants and unrelated to the claims against Azoff.

Marie applies the rationale of *Howsam* based upon the purposes of the Federal Arbitration Act and the traditional roles of courts and arbitrators.

The Preliminary 2000 Deal Memorandum is set forth at Appendix D, pages 15a-31a. The purported arbitration clause is quoted hereinabove at footnote 1. It is not clear from reading that language whether arbitration was even intended by the parties, or whether the reference to arbitration was a typographical error. It appears that the reference to arbitration was erroneously inserted into a provision intended only to deal with the application of California law and issues of jurisdiction and venue. That conclusion is bolstered by the fact that the provision states that the right to arbitration is "further specified in the 1994 Deal Memorandum," yet the referenced 1994 Deal Memorandum contains no arbitration provision whatsoever and makes no reference to arbitration. There is no policy in favor of arbitration unless the parties have agreed to submit their disputes to an arbitrator. *Badie v. Bank of America*, 67 Cal.App.4th 779, 787-788, 804 (1998).

Assuming, *arguendo*, that there was an enforceable agreement to arbitrate, the obligation to arbitrate would be limited to "disputes arising out of or in connection with this agreement . . . . " None of the claims against Azoff in the Azoff Action fits that description, and only marginal claims in the Eagles Actions would be arbitrable.

The allegations against Azoff in the Azoff Action make no reference whatsoever to the Preliminary 2000 Deal Memorandum and do not assert a dispute arising out of or in connection with that agreement. The Azoff Action alleges that, between 1994 and 2001, Azoff conspired with Henley and Frey to diminish Felder's compensation, to reduce Felder's ownership and control of the band, to divert corporate opportunities, and to oust Felder from the band. The facts on which those allegations are based do not include reference to the Preliminary 2000 Deal Memorandum or allegations that that agreement was breached.

The Preliminary 2000 Deal Memorandum, attached to the petition as Appendix D, related solely to the distribution of a four-CD "box set" of Eagles recordings, consisting of three CDs of previously recorded material and one CD of "Millennium Concerts" recorded at the end of 1999. The Preliminary 2000 Deal Memorandum provided expressly that it had nothing to do with the ownership of the Eagles name or the rights of Felder or any other member of the band in that name. (Paragraph 4(c), at Appendix 22a.) That Memorandum had nothing to do with the matters at issue in the Azoff Action, which alleged that Azoff conspired with Henley and Frey to remove Felder from the band and to deprive him of his ownership interest in Eagles, Ltd. There was no allegation that Azoff failed to perform any obligations he had under that Memorandum. Indeed, Azoff was not a party to the Memorandum and had no obligations to perform under it.

It is also clear that the allegations against the Eagles Defendants did not focus on the Preliminary 2000 Deal Memorandum. The gravamen of the action against the Eagles Defendants was that Felder was wrongfully ousted from the band without cause and deprived of the value of his ownership interest in the Eagles name. Those claims had nothing to do with the Preliminary 2000 Deal Memorandum and were not arbitrable under it.[3]

———◊———

[3] Only the fifth and sixth causes of action of the Second Amended Complaint against the Eagles Defendants related to the Preliminary 2000 Deal Memorandum. The fifth cause of action alleged a breach of the Memorandum by refusing to allow Felder to examine the books of N.E.A., LLC. The sixth cause of action sought an accounting of various entities, including N.E.A., LLC.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: August 15, 2005

Respectfully submitted,

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RESPONDENT'S APPENDIX

No. _____

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION, _____

DON FELDER,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY – CENTRAL DISTRICT,

Respondent,

EAGLES, LTD.; DON HENLEY; GLENN FREY; EAGLES TOURING CO.; EAGLES MERCHANDISING CO.; EAGLES RECORDING CO.; N.E.A. LLC; and IRVING AZOFF,

Real Parties in Interest.

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [EXHIBITS (17 VOLUMES) FILED UNDER SEPARATE COVER]

From the Superior Court for Los Angeles County – Central District Case No. BC 244814 [Consolidated with BC249741 and BC309927] Honorable Mel Red Recana, Judge; Dept. 45 After Order Granting Motion to Compel Arbitration and Ordering Consolidated Cases to Binding Arbitration.

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PETITION FOR WRIT OF MANDATE

INTRODUCTION

By its order dated September 20, 2004; respondent Superior Court ordered to arbitration three consolidated cases brought by petitioner Don Felder ("petitioner," "plaintiff" or "Felder") arising out of his wrongful ouster from the legendary rock and roll band The Eagles. That order was an abuse of discretion and erroneous as a matter of law because defendants in all three cases unequivocally waived arbitration by their litigation conduct and because the purported arbitration provision is unintelligible and does not cover the claims alleged in the consolidated action.

Issuance of a writ of mandate is essential because it is the only remedy that will preserve petitioner's right to a trial of the consolidated action and redress a gross miscarriage of justice. If the writ is denied, petitioner will be wrongfully deprived of his constitutional right to a jury trial and severely prejudiced in having to arbitrate the consolidated cases after three and one-half years of litigation.

THE PARTIES

1. All exhibits accompanying this petition under separate cover are true and correct copies of documents on file with respondent court, except Exhibits 11 and 12, which are true and correct copies of the original reporter's transcripts of the hearings of August 9, 2004 and September 15, 2004, respectively. The exhibits are numbered 1 through 13. Because the original documents filed with respondent court contained numerous tabbed exhibits, the documents are identified herein as "Exhibit No. ___ at exhibit ___, page ___." All of the exhibits have been consecutively paginated.

2. Petitioner Don Felder ("Felder" or "plaintiff" or "petitioner") is the plaintiff in all three of the consolidated cases – Case No. BC244814 and BC249741 (the "Eagles Actions") and Case No. BC309927 (the "Azoff Action"). Felder was the lead guitarist of the Eagles band for 27 years until he was wrongfully ousted from the band in February 2001. At all times material, Felder was a one-third owner of Eagles, Ltd., the company that owns the Eagles name and trademark. Felder composed the music for the Eagles' most famous song, "Hotel California," as well as other songs.

3. Case No. BC244814 was filed on February 8, 2001 against defendants and real parties in interest Eagles, Ltd., Don Henley ("Henley") and Glenn Frey ("Frey") for involuntary dissolution and an accounting. Henley and Frey are each one-third owners of Eagles, Ltd. and are the principal singers and composers of the band. Case No. BC249741 was filed on May 2, 2001 against the same defendants and real parties in interest, as well as defendants and real parties in interest Eagles Touring Co.,

Eagles Merchandising Co., Eagles Recording Co., and N.E.A., LLC[1] for breach of implied-in-fact contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief. Those two cases were related and are referred to hereinafter as the "Eagles Actions" against the "Eagles Defendants."

THE EAGLES ACTIONS ARE CONSOLIDATED AND LITIGATED

4. After the Eagles Actions were consolidated, respondent court ordered that the allegations in those actions be combined into a single pleading, which was filed as the Second Amended Complaint on October 22, 2001 (Exhibit No. 5 at exhibit T, page 904.)

5. Each of the Eagles Defendants filed an identical answer to the Second Amended Complaint, alleging 15 affirmative defenses. None of the affirmative defenses made any reference to a claimed right to arbitrate the dispute. (Exhibit No. 5 at declaration paragraph 31, at pages 557-558 and exhibit U, at page 939.)

6. The Eagles Actions were aggressively litigated by the parties from February 2001 through July 2004. With his opposition to the motion to compel arbitration, plaintiff filed an Appendix of Discovery to show respondent court the staggering volume of discovery in the Eagles Actions. The Appendix of Discovery is Exhibit 6 hereto and covers pages 1083 to 4219 under tabs numbered 1 to 195. Plaintiff also filed with respondent court the pleading index

[1] These entities were created by Henley and Frey to receive revenues generated by the Eagles that had previously been received by Eagles, Ltd.

from the Christensen Miller firm showing 400 separate entries, filling 29 volumes of pleadings from January 2001 through July 2004 (Exhibit No. 5 at exhibit A, pages 560-649.)

7. As reflected in the Appendix of Discovery and the pleading index, there were 12 depositions taken by plaintiff and defendants in the Eagles Actions, comprising more than 4,300 pages, and including five full days of plaintiffs deposition by the Eagles Defendants. Plaintiff Felder was questioned about every aspect of his relationship with the Eagles and Azoff going back to 1974, when Felder first joined the Eagles. Plaintiff was required to explain all of the facts underlying the allegations in the Second Amended Complaint and his reasons for believing that he had been wrongfully ousted from the band.

8. Also, as reflected in the Appendix of Discovery and the pleading index, the Eagles Defendants propounded two massive sets of document requests, one set of requests for admissions, three sets of form interrogatories, and one set of special interrogatories exploring in detail all of the legal theories, facts, documents, and witnesses upon which Felder relied. In response, Felder produced thousands of pages of documents, as well as volumes of answers and objections to the discovery demands.

9. The Appendix of Discovery and the pleading index filed with respondent court also show that plaintiff conducted extensive written discovery of the Eagles Defendants, including multiple sets of requests for admissions, special interrogatories, form interrogatories, and requests for production of documents.

10. As late as July 1, 2004, the Eagles Defendants moved to compel further responses to their second set of

requests for admissions, third set of form interrogatories, and first set of special interrogatories. (Exhibit No. 5 at exhibit Y, page 1030.)

11. The Eagles Defendants also cross-complained against Plaintiff in August 2002. In their cross-complaint, the Eagles Defendants alleged that Felder intended to write a book about the Eagles and that that would violate a confidentiality provision in the 1994 Deal Memorandum among the band members. (Exhibit No. 5 at exhibit W, page 1012.) In February 2004, Felder asked the Eagles Defendants to dismiss their cross-complaint based on Felder's written agreement that he would not publish a book about the Eagles, but the Eagles Defendants refused to dismiss their cross-complaint. (Exhibit No. 5 at exhibit X, page 1027.)

12. Felder paid hundreds of thousands of dollars in attorney's fees and costs in litigating the Eagles Actions in respondent court.

13. On June 14, 2004, Felder voluntarily dismissed without prejudice the prayer for dissolution of Eagles, Ltd. in the Second Amended Complaint, leaving to be tried in the Eagles Actions the causes of action for breach of implied-in-fact employment contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief.

THE AZOFF ACTION IS CONSOLIDATED AND LITIGATED

14. On January 30, 2004, plaintiff filed his action against Irving Azoff, the manager of the Eagles for breach of fiduciary duties and constructive fraud, (the "Azoff

Action"). Plaintiff Felder alleged that Azoff owed fiduciary duties to him as the manager of the Eagles and as his manager and that Azoff breached those duties by conspiring with Henley and Frey to orchestrate Felder's ouster from the band and by favoring the interests of Henley, Frey and Azoff over the interests of Felder. (Exhibit No. 5 at exhibit V, Page 957.) The Azoff Action did not name Henley and Frey as defendants or seek relief against them.

15. In February 2004, O'Melveny & Myers – the same attorneys who represented the Eagles Defendants since February, 2001 – appeared on behalf of Azoff. They litigated the Azoff Action in respondent court from February 2004 through July 2004.

16. Commencing in February 2004, counsel for Azoff engaged in a lengthy series of negotiations with counsel for plaintiff regarding consolidation of the Azoff Action with the Eagles Actions and the date for trial. (Exhibit No. 5 at exhibit F, page 674.)

17. Ultimately, counsel for Azoff stipulated that the Azoff Action, filed January 30, 2004, should be consolidated for all further proceedings with the Eagles Actions, which had been pending since February 2001, and respondent court so ordered on March 10, 2004. (Exhibit No. 5 at exhibit G, page 701.) Neither the Eagles Defendants nor Azoff made any mention of any claimed right to arbitration when the Eagles Actions and the Azoff Action were consolidated.

18. Also, in March 2004, Azoff filed a motion to strike allegations from the Azoff Action and for sanctions. Only after plaintiff agreed to amend certain allegations incorporated by reference in the Azoff Action, Azoff sought

and obtained an order from respondent court withdrawing his motion to strike and for sanctions. (Exhibit No. 5 at exhibits H and I, pages 709 and 714.)

19. On April 14, 2004, Azoff demurred to the complaint against him in the Azoff Action. The demurrer challenged the complaint on the merits, arguing that Azoff was not Felder's manager, that Azoff owed no fiduciary duties to Felder, and that Azoff did not intend to deceive Felder. Azoff made no mention of any claimed right to arbitration. (Exhibit No. 5 at exhibit J, page 717.)

20. At a hearing on May 3, 2004 in respondent court – three months after the Azoff Action was filed – Azoff sought a continuance of the trial in the consolidated action from August 16, 2004 to Spring 2005. The basis for the request was that Azoff needed more time to conduct discovery. There was no suggestion that the consolidated action or that the Azoff Action alone should be arbitrated. To the contrary, Azoff and the Eagles Defendants agreed expressly that the case should be tried in respondent court and agreed that the trial date would be January 31, 2005. (Exhibit No. 5 at exhibit O, pages 784-788 and 790-791.)

21. Although Azoff did not propound his own written discovery in the Azoff Action in addition to the massive written discovery propounded by the Eagles Defendants in the Eagles Actions, Azoff did schedule depositions of Felder and his transactional lawyer and responded to Felder's written discovery. (Exhibit No. 5 at exhibit N, page 772.) In those responses, Azoff asserted numerous objections which never raised a claim to arbitration. (Exhibit No. 5 at exhibit Q, page 802.)

22. On June 14, 2004 – four and one-half months after the Azoff Action was filed – Azoff answered the

complaint. He asserted 15 affirmative defenses but never even mentioned a claimed right to arbitration. (Exhibit No. 5 at exhibit L, Page 740.)

23. In July 2004, new counsel for Azoff substituted into the case in place of O'Melveny & Myers, which continued to represent the Eagles Defendants. Azoff's new counsel, Kaye Scholer, asked for a continuance of Azoff's deposition, then scheduled for July 13, 2004, to provide more time to prepare for the deposition. All parties in the consolidated action then entered into a written stipulation, which continued Azoff's deposition to August 11, 2004 and confirmed the depositions of Felder and Barry Tyerman (his transactional lawyer), Henley, and Frey in late September 2004. The stipulation also confirmed in writing the agreement of all parties in the consolidated action that the January 31, 2005 trial date in respondent court was "firm" and would not be continued. Respondent court entered its order on the stipulation on August 5, 2004. (Exhibit No. 5 at exhibit P, page 794.)

24. Azoff's new counsel conceded at a hearing on August 9, 2004 that his file consisted of 27 boxes and included the discovery taken in the Eagles Actions. (Exhibit No. 11, at pages 4591-4592 and 4595.)

THE MOTIONS TO COMPEL ARBITRATION

25. On August 9, 2004, Azoff, through his new counsel, filed a motion to compel arbitration of all claims in the consolidated action. (Exhibit 1 at page 1.) A right to arbitration was claimed under a purported arbitration clause in the Preliminary 2000 Deal Memorandum, as follows: "This agreement shall be governed by the laws of the State of California without regard to its choice-of-law

principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum." (Exhibit No. 5 at exhibit D, page 658.)

26. Although the purported arbitration agreement stated that the right to arbitrate was "further specified in the 1994 Deal Memorandum," the 1994 Deal Memorandum made no reference whatsoever to arbitration. (Exhibit No. 5 at exhibit E, pages 664 to 673.)

27. Azoff claimed that his petition to compel arbitration was timely, that he was a third party beneficiary of the Preliminary 2000 Deal Memorandum, and that, because the cases were consolidated, all claims had to be arbitrated.

28. On August 9, 2004, the Eagles Defendants joined in Azoff's motion to compel arbitration of all claims in the consolidated action. (Exhibit No. 3, page 410.) The Eagles Defendants argued that the claims against them had to be arbitrated because the cases were consolidated and Azoff had a right to arbitrate and that the filing of the Azoff Action gave the Eagles Defendants the right to "revisit" their decision to forego arbitration, despite three and one-half years of litigation.

RESPONDENT COURT'S DECISION

29. The motion to compel arbitration was heard on September 15, 2004 in respondent court. (Exhibit No. 12, at page 4606.) After oral argument, respondent court took the motion under submission.

30. On September 20, 2004, respondent court issued its ruling (Exhibit No. 13, page 4645). Respondent court ordered the consolidated cases to binding arbitration and stayed all proceedings pending the outcome of arbitration. Respondent court found that Azoff had not waived his right to arbitrate because his motion was timely, he had not conducted any discovery, and plaintiff had suffered no prejudice from Azoff's actions. Respondent court's ruling said nothing about the litigation of the Eagles Actions, any prejudice to plaintiff from the three and one-half years of litigation of the Eagles Actions by the same counsel who had represented Azoff, the stipulation to consolidate the Eagles Actions and the Azoff Action, or the stipulation and court order to try the consolidated action in respondent court on January 30, 2005.

BASES FOR RELIEF

31. Respondent court's order is an abuse of its discretion and erroneous as a matter of law because the Eagles Defendants and Azoff, by their litigation conduct and use of discovery, waived any right they might have had to arbitrate the consolidated action and are judicially estopped from moving to compel arbitration. The Eagles Defendants, with knowledge of the purported arbitration clause, litigated the case aggressively for three and one-half years and thereby deprived plaintiff of any benefit he could have derived from a timely arbitration. Azoff, with knowledge of that litigation and of the purported arbitration clause, and with access to the discovery in the Eagles Actions, litigated the Azoff Action for seven months, stipulated to the consolidation of the Azoff Action with the Eagles Actions, and stipulated that the consolidated action would be tried in respondent court on January 31, 2005.

32. There can be no doubt that the Eagles Defendants waived arbitration by their three and one-half years of aggressive litigation. Assuming, *arguendo,* that respondent court could find that Azoff had not waived arbitration by his litigation conduct over seven months, it could not order the claims against the Eagles Defendants to arbitration. At most, the claims against Azoff could have been ordered to arbitration, while the Eagles Actions were ordered to trial. Respondent court abused its discretion in ordering the three consolidated cases to arbitration.

33. The purported arbitration clause is unintelligible and refers to an arbitration clause in the 1994 Deal Memorandum which does not exist.

34. The purported arbitration clause has no application to the Azoff Action. The Azoff Action does not allege against Azoff any claim arising out of or in connection with the Preliminary 2000 Deal Memorandum. That memorandum dealt with the release of a four-CD Box Set and a Millennium Album, which events are not in dispute with Azoff. Azoff was not a signatory to the Preliminary 2000 Deal Memorandum or an intended beneficiary. The Eagles Actions do not assert causes of action against Azoff. The fifth and sixth causes of action in the Second Amended Complaint (Exhibit No. 5 at exhibit T, page 904), which allege that Henley and Frey breached the Preliminary 2000 Deal Memorandum by refusing to allow Felder to examine the books and records of N.E.A., LLC, assert no claims against Azoff and are unrelated to any claims in the Azoff Action.

35. Petitioner was profoundly prejudiced by the failure of the Eagles Defendants and Azoff to timely demand arbitration. During the litigation of the Eagles

Actions, petitioner expended hundreds of thousands of dollars in attorney's fees and costs and divulged all of the facts, witnesses, documents, and legal theories supporting each of his claims. All of that discovery redounded to the benefit of Azoff, who was represented by the same counsel. The prejudice to petitioner was compounded by Azoff because petitioner would never have sought consolidation or agreed to consolidation of the Eagles Actions with the Azoff Action if he had known that Azoff would assert a right to arbitration. From January 30, 2004 through the end of July 2004, Azoff was represented by the same counsel as the Eagles Defendants and never claimed any right to arbitration. Indeed, Azoff answered the complaint on June 14, 2004 and asserted 15 affirmative defenses, none of which even mentioned a claimed right to arbitration.

36. Petitioner has no right of appeal from respondent court's order and has no plain, speedy and adequate remedy at law other than the relief sought in this petition.

37. If the petition for writ of mandate is denied, petitioner will suffer irreparable injury because he will be forced to arbitrate his disputes against the Eagles Defendants and Azoff after having litigated the consolidated action for three and one-half years and will be deprived of his constitutional right to a jury trial.

38. Petitioner's right of appeal, which can be invoked only after the consolidated action is concluded, is wholly inadequate because that right will not redress petitioner's loss of his right to try the consolidated action in the Superior Court.

PRAYER

WHEREFORE, petitioner prays that:

1. An alternative writ of mandate issue under the seal of this Court commanding respondent court (1) to vacate its order of September 20, 2004 compelling the arbitration of the consolidated cases and (2) to enter a new order denying the motion to compel arbitration and setting the consolidated cases back on track for trial, or to show cause before this Court at a time and place then or thereafter specified by Court order why it has not done so and why a peremptory writ should not issue.

2. On the return of the alternative writ and hearing on the order to show cause, a peremptory writ of mandate issue under the seal of this Court commanding respondent court (1) to vacate its order of September 20, 2004 compelling the arbitration of the consolidated cases and (2) to enter a new order denying the motion to compel arbitration and setting the consolidated cases back on track for trial.

3. This Court award petitioner his costs of this action.

4. The Court grant such other relief as may be just and proper.

Dated: October 8, 2004 Respectfully submitted,

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Joel N. Klevens
JOEL N. KLEVENS,
Attorneys for Petitioner,
Don Felder

VERIFICATION

I, Don Felder, declare as follows:

1. I am the plaintiff in the consolidated actions, Case No. BC244814 and Case No. BC249741 (the "Eagles Actions") and Case No. BC309927 (the "Azoff Action"), and I am the petitioner herein.

2. I have read the petition for writ of mandate and know its contents. All facts alleged in the petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on October 8th, 2004.

/s/ Don Felder
DON FELDER

Supreme Court, U.S.
FILED
SEP 8 - 2005
OFFICE OF THE CLERK

(3)

No. 04-1713

IN THE

Supreme Court of United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC, AND IRVING AZOFF,
Petitioners,

— v. —

DON FELDER,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

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868 A.2d 860 (D.C. 2005) 1, 2

REPLY BRIEF FOR PETITIONERS

1. Respondent does not – and could not – seriously dispute that a direct and acknowledged conflict exists among federal circuit and state high court decisions on the question presented by this case, *viz.*, whether a waiver defense to arbitration under an agreement governed by the Federal Arbitration Act ("FAA") is an issue for the court (rather than the arbitrator) merely because the alleged waiver is based on a party's litigation conduct. This Court broadly held in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), that "allegations of waiver, delay, or a like defense of arbitrability" are matters for the arbitrator, and the Eighth Circuit and two state high courts have squarely concluded that the "allegations of waiver" committed to the arbitrator include allegations of waiver by litigation conduct. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860, 865 (D.C. 2005); *Guam Housing & Urban Renewal Auth. v. Pac. Superior Enter. Corp.*, 2004 Guam 22, ¶ 40. By contrast, the decision below, along with decisions of the First and Fifth Circuits, squarely hold that the question of waiver by litigation conduct is for the court, not the arbitrator. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004) (unpublished). Decisions of the lower courts are likewise divided on this important issue. Pet. 9. The First Circuit's decision in *Marie* explicitly acknowledges the direct conflict among the courts over the application of *Howsam* to the doctrine of waiver of arbitration by litigation conduct. *Marie*, 402 F.3d at 12 (discussing cases).

2. Unable to dispute the principal ground on which certiorari is warranted – the existence of a square decisional conflict on the precise question presented – respondent retreats to purely merits-based arguments. Respondent con-

tends that review should be denied because the court below (1) correctly concluded that waiver by litigation conduct is a question for courts (not arbitrators) to resolve, and (2) correctly concluded that petitioners' litigation conduct did, in fact, waive their right to compel arbitration. Those arguments are wrong on their own terms, but the more important point here is that respondent's merits arguments are just that – *merits* arguments, not reasons this Court should deny review and leave the lower courts in turmoil over the straightforward and undeniably important arbitration-enforcement question this case presents.

Although respondent's merits arguments are entirely premature at this jurisdictional stage, they are also incorrect. As to the substance of the question presented – who decides waiver by litigation conduct, the court or the arbitrator? – respondent contends that the decision below is supported by the "clear weight of authority," citing all of a single decision, the First Circuit's opinion in *Marie*. Br. Opp. 12. In truth the weight of authority strongly favors petitioners' position that all allegations of waiver, including those based on litigation conduct, are within the arbitrator's presumptive sphere of authority. *See Transamerica Occidental*, 328 F.3d at 466; *Woodland Ltd. P'ship*, 868 A.2d at 865; *Guam Housing & Urban Renewal*, 2004 Guam 22, ¶ 40; *Bellevue Drug Co. v. Advance PCS*, 333 F. Supp 2d 318, 324-25 (E.D. Pa. 2004); *Housh v. Dinovo Invs., Inc.*, 2003 U.S. Dist. LEXIS 3707, at *32-33 (D. Kan. 2003); *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 113 P.3d 961, 969 (Or. Ct. App. 2005).[1]

[1] *See also Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 46 (2d Cir. 2003) (under FAA and *Howsam*, *all* procedural defenses to arbitrability, including waiver, estoppel, and delay, are presumptively for the arbitrator to decide); *Int'l River Ctr. v. Johns-Manville Sales Corp.*, 861 So. 2d 139, 144 (La. 2003) (applying *Howsam* to conclude that for arbitration agreements governed by state statute similar to the FAA, "waiver is reserved for the arbitrator to decide").

Further, the flawed analysis in *Marie* only illustrates the extent to which respondent's view – and the decision below – departs from this Court's decision in *Howsam* and the fundamental policies of the FAA. As respondent acknowledges, *Marie* relies on the "important policy consideration" that courts possess "expertise" superior to arbitrators in determining whether litigation conduct constitutes a waiver of a right to compel arbitration otherwise enforceable under the FAA. Br. Opp. 13. But neither *Howsam* nor any other arbitration-related decision of this Court has ever endorsed such a cramped view of arbitrators' expertise. To the exact contrary, the Court has time and again reaffirmed that arbitrators are fully equipped to resolve difficult procedural, factual, and legal questions of all kinds. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 n.5 (1991); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "[W]e are well past the time when judicial suspicion of . . . the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Indeed, this very case illustrates the flawed anti-arbitrator presumption underlying *Marie*'s (and respondent's) reasoning. The argument that courts are superior to arbitrators in evaluating waiver by litigation conduct relies heavily on the trial court's proximity to (and thus presumed closer familiarity with) the relevant litigation conduct. But in this case, the trial court held that petitioners' conduct did *not* waive their right to arbitration. Pet. App. 12a-13a. Yet with no closer proximity to the conduct at issue than an arbitrator would have, the appellate court considered itself fully capable of evaluating the record and reaching its own, differing conclusion as to whether petitioners' litigation conduct waived their right to arbitrate the dispute. The appellate court's object demonstration that waiver-by-litigation-conduct arguments

can be evaluated on the basis of the record disproves the premise that first-hand proximity to the litigation conduct is a prerequisite for evaluating a waiver defense to arbitration arising from such conduct. And neither the appellate court nor respondent persuasively explains why an arbitrator cannot likewise analyze a litigation record and reach his or her own informed judgment as to whether that record establishes a waiver of a party's contractual right to resolve a dispute through arbitration.[2]

The conflicting decisions as to petitioners' asserted waiver reached by the trial and appeals courts in this case also refute respondent's suggestion that petitioners so obviously waived their right to arbitration that it would now be a waste of time to ask an arbitrator to make that determination. Br. Opp. 8-12. On its face respondent's substantive waiver argument of course has nothing whatsoever to do with the question presented here, which is not whether respondent's waiver argument *is correct*, but *to whom the argument should be addressed* (the arbitrator or the court). Nor would the answer be foreordained here, as respondent asserts. Br. Opp. 11. To the contrary, the trial court – the tribunal supposedly best positioned to evaluate waiver-by-conduct arguments – flatly *rejected* respondent's waiver argument. As

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[2] Moreover, resolution of most claims of waiver by litigation conduct (such as the one advanced by respondent in this case) involves a comparison of the information obtained by a party seeking to compel arbitration through discovery in court to the type of information the party could have obtained through discovery and claim specification procedures in arbitration. *See, e.g., St. Agnes Med. Ctr. v. PacifiCare*, 82 P.3d 727, 738 (Cal. 2003) (under FAA, waiver can be found where party obtained information through discovery that it could not have obtained in arbitration). It is arbitrators, not courts, who have superior expertise in determining what type of information can be obtained through arbitration. *Cf. PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (arbitration must be compelled under FAA where antecedent question on which defense to arbitration rests is within the arbitrator's sphere of authority).

the trial court explained, respondent would suffer no "prejudice" – a prerequisite to a finding of waiver by litigation conduct – because petitioner Azoff had only been party to the consolidated actions for a matter of months and timely filed his motion to compel arbitration "as soon as his counsel were up to speed" on the case. Pet. App. 12a. Further, Azoff had "taken no action to undermine or impair [respondent's] ability to take advantage of the benefits and efficiencies of arbitration" and gained no information through discovery that he could not have gained in arbitration. *Id.*[3] Respondent obviously disagrees with the trial court's substantive conclusion that petitioners' right to compel arbitration had not been waived, but that is irrelevant here. What matters is that the disagreement over waiver should not have been aired before the trial court at all, but should have been submitted to the arbitrator.[4]

Respondent's final merits-related contention is that the FAA is altogether inapplicable here because the parties did

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[3] Even though the case against the Eagles petitioners had been pending for a greater period of time, respondent's recent decision to change the nature of his case (Pet. 3) refuted any claim of waiver against them. *See Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (arbitration may be allowed even after active litigation where plaintiff changes "scope or theory" of original claims); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509-10 (7th Cir. 1999) (same).

[4] Respondent's contention (again relying on *Marie*) that the issue of waiver by litigation conduct should be committed to the court simply for the sake of "efficiency" (Br. Opp. 11) contradicts repeated decisions of this Court squarely holding that assertions of potential "inefficiency" do *not* justify disregarding basic rules governing enforcement of arbitration agreements under the FAA. *See First Options, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) ("[T]he basic objective in this arena is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." (citations omitted)); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

not unequivocally agree to submit their disputes to arbitration. Br. Opp. 14-17. But the trial court below rejected that argument in finding the dispute to be arbitrable, and the court of appeal likewise assumed that petitioners had an otherwise enforceable right under the FAA to arbitrate the entire dispute, but waived that right through their litigation conduct. In other words, *neither* court below held that the parties lacked an enforceable agreement to arbitrate respondent's substantive claims, as respondent now contends. That issue is not presented here. The decisions below present – cleanly and clearly – a single question for resolution by this Court: whether the arbitrator's presumptive authority to decide waiver-based defenses to arbitration includes alleged waivers based on litigation conduct.

The Court should grant review to resolve the clear and irreconcilable conflict in the courts over that question.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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